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TO  
HONORABLE JOHN F. DILLON, LL.D.,  
EMINENT ALIKE  
FOR  
THOROUGH PRACTICAL AND SCIENTIFIC KNOWLEDGE OF THE LAW  
AND THE  
VARIOUS CONTRIBUTIONS TO OUR JURISPRUDENCE  
THIS WORK IS DEDICATED  
AS AN EXPRESSION OF GRATITUDE FOR HIS KINDNESS AS A FRIEND,  
AND AS A TRIBUTE TO HIS LEARNING AND ABILITY,  
BY THE AUTHOR.



## PREFACE.

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DURING the fifteen years that have elapsed since the Author's former work upon this subject was published, the immense growth of the case law, both in Great Britain and this country, upon the various topics embraced in the work has demanded, at the author's hands, a much more radical and comprehensive revision of that work, than would be recognized under the title, "Second Edition."

Within that interval, the Supreme Court of the United States has settled the vexed question as to the effect of judgments of other states; the various state courts of last resort have rendered a multitude of decisions as to the status and force of decrees of divorce pronounced by courts of sister states; and some startling innovations have been made respecting the collateral attack of judgments.

The doctrine of Estoppel by Deed has been considerably extended in its application, while that of Equitable Estoppel has been steadily and persistently enlarged in its scope, vigor and freedom of application by the tribunals of both countries. The great growth of the case law is shown by

the advance in the number of cases cited—from 2,700 in the former work to upwards of 16,000 in this; and in the increase in the number of pages of text, from 565 to 1,449. The former work contained 621 sections; this one, 1,307. In that work, 228 pages were found to afford sufficient space for the proper treatment of Estoppel by Judgment; in this, 703 pages are needed for that subject. The treatment of other important topics has been correspondingly enlarged; the result being, not a “second edition” of the former work, but an entirely new, independently written treatise on the subject.

That some errors in citations will creep in, where so very many cases are cited, is to be regretted; but cannot be prevented; for these, when they occur, the author bespeaks the kind indulgence of the profession, who, by the favorable reception of his other works, have given him assurance of the utility of his labors in their behalf.

H. M. HERMAN.

MILLS BUILDING, NEW YORK,  
March 1, 1886.

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# THE LAW OF ESTOPPEL.

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## CHAPTER I.

### THE ORIGIN, NATURE, AND OBJECT OF ESTOPPELS.

SECTION 1. There are but few older principles or rules of law that have been handed down from generation to generation, from the earliest days of the Roman law to the present time, than that of Estoppel. The term estoppel is derived from the French word *estoupe*, whence the English word stopped, and it is called an estoppel, or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth. Conclusion is derived from the verb *concludo*, which is derived from *con* and *cludo*, to determine, to finish, to shut up, to estop, to bar a man, to plead or claim anything; it signifies literally the winding up of all arguments and reasoning.

§ 2. Touching estoppels, says Lord Coke, which are a curious and excellent kind of learning, it is to be observed there are three kinds of estoppels: BY MATTER OF RECORD; BY MATTER IN WRITING; AND BY MATTER IN PAIS; and although Coke uses the word writing it is clearly evident that the writing which will operate as an estoppel must be a deed.<sup>1</sup> Estoppels, therefore, are:

1. BY MATTER OF RECORD;
2. BY DEED;
3. IN PAIS.

<sup>1</sup> *Stratton v. Rastall*, 2 T. R. 366; *Lampon v. Cork*, 5 B. & A. 611; *Greaves v. Key*, 3 B. & A. 313.

§ 3. A man is said to be estopped when he has done some act which the policy of the law will not permit him to gainsay or deny. An estoppel is when a man is concluded by his own act. An estoppel is an obstruction or bar to one's alleging or denying a fact contrary to his own previous action, allegation or denial. A conclusion or admission which cannot be controverted. A man shall always be estopped by his own deed, or not permitted to aver or prove anything in contradiction to what he has once solemnly avowed. Estoppels signify that a man, for the sake of good faith and fair dealing, should be estopped for saying that to be false which by his means has once been accredited for truth, and by his representations has led others to act. The very meaning of estoppel is when an admission is intended to lead and does lead a man with whom a party is dealing into a line of conduct which must be prejudicial to his interest, unless the party estopped be cut off from the power of retraction. An estoppel affecting the right of a party in real estate may be created by matter *in pais*, consisting of acts and declarations of a person by which he designedly induces another to alter his position, injuriously to himself; as for instance, if a person with full knowledge, permits another without objection, to sell his property as the property of the vendor, he will be estopped from questioning the title of a *bona fide* purchaser; and where one has a secret title or trust or interest in property, and permits one to expend money on the property, he is estopped from questioning the title.<sup>1</sup>

§ 4. There is no principle better established, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel. "*Qui tacet, consentire videtur, qui potest et debet vetare, jubet.*" If there be one principle of law more clear than

<sup>1</sup> *Pigott v. Stratton*, 29 L. J. Ch. 9; *McCance v. Lond. &c. R. W. Co.*, 34 L. J. Exchq. 39. Post, chap. XV.

another it is this, that where a person has made a deliberate statement with a view to induce another to act, the former is not at liberty to deny the truth of the statement so made.<sup>1</sup> When in the course of legal proceedings an attempt is made to violate this principle, the law replies in the words of the maxim "*allegans contraria non est audiendus*," and by applying the doctrine of estoppel therein contained, prevents the unjust consequences which would otherwise ensue.<sup>2</sup> As for instance, if the owner of goods, to prevent them from being attached as his own, represent that they belong to another, and the party to whom the representation is made, relying, and from the circumstances having reason, to rely, on the representation as true, attach the goods for a debt due from the party to whom it was represented that the goods belonged, in trover for attaching the goods, the owner will not be permitted to show that his representation was false, though at the time when he made it he had no notice of the debt on which the goods were attached, and had no intention to deceive the party who attached them.<sup>3</sup> But a party is not estopped by an admission or assertion of a conclusion of law upon undisputed facts.<sup>4</sup>

§ 5. Where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and

<sup>1</sup> McCann v. R. R. Co., 7 H. & N. 490.

<sup>2</sup> Hooper v. Lane, 6 H. L. C. 443; Ockford v. Freston, 6 H. & N. 468; Wood v. Dwaris, 11 Exchq. 493; Andrews v. Elliott, 5 E. & B. 503; Tyerman v. Smith, 6 E. & B. 719; Morgan v. Couchman, 14 C. B. 100; Molton v. Camroux, 4 Exchq. 17; Humblestone v. Welham, 5 C. B. 195; Pope v. Flemming, 5 Exchq. 244; Reg. v. Evans, 3 E. & B. 363; Braithwaite v. Gardner, 8 Q. B. 473; Williams v. Thomas, 4 Exchq. 479; Taylor v. Best, 14 C. B. 487; Petch v. Lyon, 9 Q. B. 147; Williams v. Lewis, 7 E. & B. 929; Figers v. Pike, 8 C. L. & F. 562; General, &c., Co. v. Shipper, 11 C. B. N. S. 747; Arden v. Goodacre, 11 C. B. 371; Pearson v. Dawson, E.

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<sup>3</sup> Horn v. Cole, 51 N. H. 287.

<sup>4</sup> Brewster v. Striker, 2 N. Y. 19.

induces him to act on that belief, or to alter his own previous position, the former is estopped from averring against the latter a different state of things as existing at the same time.<sup>1</sup> By the term willfully, it must be understood, if not that the party represents that to be true, which he knows to be untrue, at least, that he means his representation is to be relied and acted upon accordingly; yet generally without regard to intention, if the party so conducts himself as to deceive a reasonable man to his prejudice, he will be estopped from asserting the truth.<sup>2</sup> Thus where an action is brought for the conversion of a policy of insurance, and the plaintiff proves that he has given instructions to the defendant to effect a policy for him, and gives in evidence a letter from the defendant to the plaintiff, stating that he had effected the policy, the defendant is not allowed to contradict his own representation, and show that no policy had been effected; he is held liable as an insurer for the amount that would have been recoverable by the plaintiff on the policy if it had been duly effected.

§ 6. Wherever a man has made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden, as against them, to deny that assertion. If a man has led others into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that state of facts did not exist; a man is not permitted to charge the consequences of his own fault on others, and complain of that which he has himself brought about.<sup>3</sup> The neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake, and also it must be the neglect of some duty that is owing to the person led into that belief, or, what

<sup>1</sup> *Pickard v. Sears*, 6 A. & E. 469; *Martin v. Zellerbach*, 38 Cal. 300; *Wallis v. Truesdell*, 6 Pick. 455; *Simons v. Steele*, 36 N. H. 73; *Cowles v. Bacon*, 21 Conn. 451; *Cummings v. Webster*, 43 Me. 192; *Welland Canal v. Hathaway*, 8 Wend. 430; *Lyman v. Cessford*, 15 Iowa, 229; *Anthony v. Stevens*, 46 Ga. 241; *Gatling*

*v. Rodman*, 6 Ind. 289; *Butler v. Gannon*, 53 Md. 333. Post, Book III.

<sup>2</sup> *Freeman v. Cooke*, 6 D. & L. 187; *Preston v. Mann*, 25 Conn. 118; *Butler v. Gannon*, 53 Md. 333; *Leland v. Copeland*, 23 Me. 525; *Haines v. East Ind. Co.*, 11 Moo P. P. C. 57.

<sup>3</sup> *Swann v. N. B. Australian Co.*, 7 H. & N. 603, per Wilde, B.

comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy.<sup>1</sup> Thus the principal whose negligence has enabled his agent to cheat a third person acting with ordinary caution, is universally estopped from denying the authority of the agent. A retired partner, who has given no notice of dissolution to a customer, is estopped from denying the authority of the continuing partner to bind him with that customer. A master who has accredited a servant to a tradesman to order goods in his name, and has recalled the authority from the servant without giving notice to the tradesman, is estopped from denying the authority of the servant to bind him with such tradesman. The same principle applies to instruments under seal. But the party who claims the benefit of this doctrine of estoppel, must show that he has acted in the transaction in which he was deceived with ordinary caution.<sup>2</sup> As every man is bound to act and speak according to the truth of the case, the law presumes he has done so, and will not allow him to contradict so reasonable a presumption. This is the foundation of the doctrine of estoppels. The truth is deemed to be shown by what estops.

§ 7. The following are recognized propositions with respect to an estoppel *in pars*:

1. If a man, by his words or conduct, willfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

2. If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it is acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

<sup>1</sup> Swann v N. B. Australian Co., 2 H. & C. 175, per Blackburn, J.

<sup>2</sup> Erle in re, 30 Law J. C. P. 118.

3. If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act that way to his damage, the first is estopped from denying that the facts were as represented.

4. If in the transaction itself which is in dispute one has led another into the belief of a certain state of facts, by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist.<sup>1</sup>

5. Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts, or words, or neglect, his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something by reason of what he had said or done, or omitted to say or do.<sup>2</sup>

§ 8. An estoppel is, therefore, an admission, or something which the law treats as an admission of an extremely high and conclusive nature, so high and so conclusive that the party whom it affects is not allowed to aver against it or offer evidence to controvert it. Though it may be shown that the party relying upon it is estopped from setting it up, since this would not be to deny its conclusive effect as to himself, but to incapacitate the other from taking advantage of it. Such being the general nature of an estoppel, it matters not what the fact thereby admitted may be, or what would be the ordinary or primary evidence of that fact, whether by matter of record or specialty of writing, unsealed or mere parol. The fact may, in such case, be proved, the ordinary evidence rendered unnecessary by an estoppel; and this is no infringement on the rule of law requiring the best evidence to be produced, and forbidding secondary evidence to be produced, until the sources of primary evidence be exhausted, for the estoppel professes not to supply the absence of the ordinary

<sup>1</sup> Carr v. Railway Co., L. R. 10 C. P. 307, per Brett L. J.

<sup>2</sup> Adamson in re, re Collier, 8 Ch. Div. 817, per James, L. J.

instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted. An estoppel is an imperative and absolute presumption of law determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise; it forbids and dispenses with any ulterior inquiry. Estoppels have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and therefore it is that all corroborating evidence is dispensed with and all opposing evidence is forbidden. Courts are inclined to restrict the doctrine of technical estoppel, and favor the extension of the equitable estoppel.

§ 9. An admission, which is in the same nature as an estoppel, though not so high in degree, may be allowed to establish facts, which, were it not for the admission, must be proved by certain steps appropriated by law to that purpose; as for example, a recital in a deed stated, that the deed was executed in pursuance of a power contained in a certain will. A will, purporting to have been the will under which the deed was made, was introduced, and there was some slight evidence that, that was the will mentioned in the deed, and it was held that this was sufficient evidence to go to the jury without calling the attesting witnesses. In deciding this case, Chief Justice Tyndal said, "he did not put the admissions as high as an estoppel, but it has its effect on this principle, where a party executing a deed was held estopped by the recital of a particular fact in that deed to deny or controvert that fact."<sup>1</sup>

§ 10. Notwithstanding the unpromising definition of the term estoppel, the doctrine is in no wise unjust or unreasonable, but on the contrary, it is reasonable and just in the highest degree, that the law should provide for some solemn mode of declaration in order that men may bind themselves to the good faith and truth of representations on which other persons are to act. *In-*

<sup>1</sup> *Bringloe v. Goodson*, 1 Bing. N. C. 739; *Shelly v. Wright*, Willes, 9; *Satterlee v. Pooley*, 6 M. & W. 664; *Newhall v. Holt*, 6 M. & W. 662; *Fox v. Waters*, 12 A. & E. 43; *Mar-*  
*chioness of Annandale v. Harris*, 2 P. Wms. 432; *Mayor of Carlisle v. Blamire*, 8 East, 487; *Carver v. Jackson*, 4 Pet. 1; *Howard v. Smith*, 3 M. & G. 254; *Harris v. Mulkern*, 1 Ex. D. 36

*terest reipublicae ut sit finis litium*, is an old maxim deeply fixed in the law of fundamentals; that it concerns the state that there be an end of litigation. This maxim has a wide application; it, in fact, embraces the whole doctrine of estoppels; a doctrine which is obviously founded on common sense and sound policy. For if matters which have been once solemnly decided are to be again drawn into controversy; if facts, once solemnly affirmed, are to be again denied whenever the affirmant sees his opportunity, there can never be an end of litigation and confusion. It would be productive of the greatest inconvenience and mischief if after a cause, civil or criminal, has been solemnly determined by a court of competent and final jurisdiction, the parties could renew the controversy at pleasure, on the ground of either alleged error in the decision, or the real or pretended discovery of fresh arguments or better evidence. The slightest reflection will show that if *some* point were not established at which judicial proceedings must stop, no one could ever feel secure in the enjoyment of his life, liberty or property; while unjust, obstinate and quarrelsome persons, especially such as are possessed of wealth or power, would have society at their mercy, and soon convert it into one vast scene of litigation, disturbance and ill will. The great principle of the *finality* of judicial decision is universally recognized—" *Res judicata pro veritate accipitur*;" "*Interest reipublicae res judicatas non rescindi*;" "*Praesumitur pro justitiâ sententiae*;" "*Sententia facit jus*;" "*Infinium in jure reprobatur*;" "*nemo debet pro unâ causâ bis verari*."

§ 11. It is wise and just, therefore, to provide certain means by which a man may be estopped or concluded—not from saying the truth—but from saying that is false, which by the intervention of himself, has once become accredited for truth. And, in all probability, no Code, however rude it might have been, ever existed without some such provision for the security of men, acting as all men must, upon the representations of others.

§ 12. It may be questioned whether a judgment or decree can be properly termed an estoppel, although the parties and all those claiming by, through or under them are estopped from alleging matters inconsistent with or contrary to such judgment. They are estopped by the record; it is termed an estoppel by record in order to distinguish it from such estoppels as are cre-

ated by the party against whom the doctrine is sought to be enforced. The distinction is thus stated :

“An estoppel is always something personal. The party is estopped from recovering his claim, or proving his defense, by some act in law, or in deed, or in *pais*, which precludes him from going beyond it, and proving all the case. But a former trial, verdict and judgment is not the act of the party, but of the tribunal which decided it ; and to call it an estoppel, is a misapplication of terms ; it has not the distinguishing mark of an estoppel ; it is not the consequence of some act of the party bound by it ; it is a bar to a future recovery in any court, on the same point, between the same parties, or privies, until reversed on appeal, or writ of error ; and it is as much a bar in chancery, where an attempt is made to re-examine a matter once decided at law, as it is in a court of law.” The supreme court of the United States have put the matter on its true ground, viz : “that the order and peace of society, the structure of our judiciary system, and the principles of our government, are the true grounds why such a judgment is conclusive.” This is the true theory of the conclusiveness of judgments. A party whose rights of property, or whose liability on contracts, or whose liability in any form, is capable of the enforcement by civil action, and who has once been subjected to the jeopardy of trial, has a right to judicial immunity from further vexation, the same in degree that he who has been once in jeopardy of life or limb has to be freed from another trial for the same offense.<sup>1</sup>

§ 13. The reasons why estoppels are allowed, seem to be : First, no man ought to be allowed to allege anything but the truth for his defense, and what he has once alleged is presumed to be true, and therefore he ought not to be permitted to contradict it. It is said in the second instance, “*Allegans contraria non est audiendus*.” He is not to be heard who alleges things contradictory to each other. Secondly, as the law cannot be known until the facts are ascertained, so neither can the truth of them be found out from the evidence ; and it is reasonable that some evidence should be allowed of so high a nature as to admit of no contradictory proof.

<sup>1</sup> Huston, J., in *Killeffer v. Herr*, 17 S. & R. 324.

§ 14. The law of estoppel is not so unjust or absurd as it has been too much the custom to represent. Its foundation is laid in the obligation which every man is under to speak and act according to the truth of the case, and in the policy of the law to prevent the great mischiefs resulting from uncertainty and want of confidence in the intercourse of men, if they were permitted to deny that which they have solemnly and deliberately asserted and received as true. The doctrine of estoppel has been guarded with great strictness, not because the party enforcing it wishes to exclude the truth, but it is to be supposed that that is true which the opposite party has already recited; but because the estoppel may exclude the truth, and for this reason estoppels must be certain to every intent; *for no one shall be denied setting up the truth, unless it is in plain and clear contradiction to his former allegations and acts.*<sup>1</sup> The doctrine of estoppel is both equitable and legal, and will be applied by courts, both of law and equity, in all proper cases upon well ascertained facts and between the proper parties. Courts of equity will disregard the principles of estoppel in those cases where it becomes necessary to prevent injustice only through mistake, accident or fraud. An estoppel can never be allowed, where it would itself perpetrate fraud, work injustice, or fail to protect the innocent.<sup>2</sup>

§ 15. Estoppels are sometimes said to be odious and not favored in law,<sup>3</sup> for the object of the administration of justice is to discover and apply the truth; but there may be cases in which courts are bound to say to a litigant that he has to his own advantage, or to the injury of his adversary, asserted judicially what is false, and that having done so, he must be forever forbidden to unfold for his own benefit the truth of the matter; and it has

<sup>1</sup> Bowman v. Taylor, 2 A. & E. 278; Lainson v. Tremere, 2 A. & E. 792; Pelletreau v. Jackson, 11 Wend. 117; Carver v. Jackson, 4 Pet. 83; Jackson v. Waldron, 13 Wend. 178; Van Bibber v. Beine, 6 W. Va. 168; Callow v. Jenkinson, 3 E. L. & Eq. 533; Phillips v. Cooper, 50 Miss. 722; Kepp v. Wiggett, 1 A. & E. 792; Chaquette v. Orlet, 60 Cal. 594;

Kiern v. Ainsworth, 95 Pa. St. 310; Turner v. Edwards, 2 Woods, 435.

<sup>2</sup> Turnipseed v. Hudson, 50 Miss. 429; Mills v. Graves, 38 Ill. 455.

<sup>3</sup> Abbott v. Wilbur, 22 La. Ann. 368; Laccister v. Reheboth, 4 Mass. 180; Bridgewater v. Dartmouth, 4 Mass. 273; Franklin v. Merida, 35 Cal. 558; Owen v. Bartholmew, 9 Pick. 520; Bradford v. Company, 58 Ga. 286.

also been said that there is no equitable estoppel. But the doctrine of election, which prevents a party from claiming repugnant rights, and which has been so advantageously introduced into courts of equity, is manifestly an extension of this principle. In courts of law, they are for the most part reconcilable to the purest morality; and when they produce neither hardship nor injustice, they merit indulgence if not favor. The conclusiveness of judgments, which conduces so essentially to peace and repose, has no other foundation.<sup>1</sup> This doctrine of estoppel may debar the truth in a particular case, and is therefore not unfrequently in such cases declared odious. Still it must be remembered that it debars it only when its utterance would convict the party of previous falsehood, or would be a denial of a previous representation, on the faith of which other persons have dealt or pledged their credit, or expended their money. It is a doctrine, therefore, when properly understood and applied, that estops the truth in order to prevent fraud and falsehood; and imposes silence only when the party should not, in conscience and honesty be allowed to speak. And it is now one of the well settled principles of law, both in foreign countries and our own, that estoppels are favorably looked upon by the courts as tending, when properly construed and applied, to uphold the purpose of agreements and prevent and suppress fraud and injustice.<sup>2</sup>

§ 16. Their technicality will accordingly be restrained, their true meaning adduced and applied, and they may even be raised by implication in aid of persons who have acted on faith, of a declaration to which they were originally strangers, and which was not meant to be conclusive in their behalf. A court ought not to lend itself to enforce a contract made in violation of law, nor allow a guilty party to effectuate his ends by pleading an estoppel to the truth of the case when the policy of the law forbids the transaction.<sup>3</sup> The office of estoppels at law is like that of injunctions in equity, to preclude rights that cannot be asserted

<sup>1</sup> *Martin v. Ives*, 17 S. & R. 364.

<sup>2</sup> *Waters' Appeal*, 35 Pa. St. 522; *Bocock v. Pavey*, 8 Ohio St. 280; *Van Rensselaer v. Kearny*, 11 How. 297; *Dean v. Doe*, 8 Ind. 495; *Lessee of Buckingham v. Hanna*, 2 Ohio,

551; *Franklin v. Merida*, 35 Cal. 558;

*Amora v. West*, 7 Wall. 82; *Warwick v. Underwood*, 3 Head, 238, *Gray v. Pingry*, 17 Vt. 419.

<sup>3</sup> *Calfee v. Buigess*, 3 W. Va. 274.

consistently with good faith and justice, and prevent wrongs for which there might be no adequate remedy.<sup>1</sup> And they should, consequently, when the circumstances will permit, be so construed and molded as to not deviate from their object; and in those cases where estoppels are said to be odious or not favored, should be understood to be only where the technicality of the estoppel cannot be subservient to its equity. As for an example, in the case of the *S. E. R. W. Co. v. Warton*, in a comprehensive declaration, in an agreement to be referred to arbitrators, the parties had settled, adjusted, and mutually satisfied every other claim and demand which they had against each other, arising in any account, matter or thing whatsoever; yet this was held not to be an estoppel to a cause of action arising prior to the agreement, because the intention, as indicated by the tenor of the agreement, was to make the settlement only for the purpose of reference.<sup>2</sup> But where a deed contains a recital of a particular fact, in express terms, the effect of the recital cannot be got rid of by showing what the intention of the parties was.

§ 17. But where the language is general, the intention may be collected from the whole deed. But when a *particular clause* is of such a nature that it cannot stand without invalidating the whole instrument, it may, in such a case, be shown to be false and rejected altogether.<sup>3</sup> A deed containing a recital that a *feme sole* is covert, will not preclude either party from proving that she is a *feme sole*, in order to support the grant.<sup>4</sup> In the earlier history of the law, the doctrine of estoppels was more harshly and vigorously enforced; in fact, it was a species of legal tyranny, by means of which the intervention of an estoppel excluded the truth in many cases where justice and equity required its admission, and it often became a preposterous and absurd defense. The courts of modern times have, however, modified the doctrine, and application of estoppels to consistency and in accordance with the law of common sense and justice, and courts will be found to

<sup>1</sup> *Van Rensselaer v. Kearny*, 11 How. 297.

<sup>2</sup> 6 Hurlst. & N. 520.

<sup>3</sup> *Doe v. Carew*, 2 Q. B. 317; *Worthington v. Hillyer*, 4 Mass. 196;

*Proctor v. Pool*, 4 Dev. 370; *United States v. King*, 3 How. 773.

<sup>4</sup> *Young v. Raincock*, 7 C. B. 310; *Viner Abrig. Estoppel*, M. 8, Pl. 3; *Brinegar v. Chaffin*, 3 Dev. 108.

have been somewhat astute to reconcile the harsh doctrines of the earlier law with the substantial truth and justice of the cause.<sup>1</sup>

§ 18. An estoppel, in the words of Lord Coke, is where a man, by his own act or acceptance, is concluded to say the truth, and generally arises from some precise and positive allegation, made under circumstances which preclude the right and power of contradiction. So a party, which doubtfully alleging a fact, or even asserts its existence, agrees to be bound by it whether it exists or not, will be as much estopped from relying on it subsequently, as a defense to the contract, as if there had been a recital or stipulation expressly denying that which he seeks to establish. The evidence under these circumstances is shut out—not because it is inconsistent with the deed or false—but as being, by the terms of the agreement, irrelevant to the decision of the case before the court.<sup>2</sup> So the estoppel of a compromise rests on the same basis and may arise without a seal. As an illustration of this principle, the following case may be cited: An agreement made with a patentee to manufacture his machines upon certain conditions, and making and selling such machines under the patentee's title, estops the manufacturer from alleging the invalidity of the patent as a defense to an action by the patentee for an account under the contract.<sup>3</sup> Where a remedy is by action, an executory agreement; as for example, not to convey or sue, does not operate as an estoppel;<sup>4</sup> but when such an agreement is intended to give force and effect to a present transfer and covenants of warranty for quiet enjoyment, or for a future assurance, it not only precludes the covenantor from disputing the title he has conveyed, but from asserting any other that he may subsequently acquire.<sup>5</sup>

§ 19. The effect of an estoppel, whether legal or equitable, is confined to precluding the parties from contradicting the recital or admission on which the estoppel is founded,<sup>6</sup> and its ex-

<sup>1</sup> Den v. Camp, 4 Harr. 148.

<sup>2</sup> Temple v. Partridge, 42 Me. 56; Jackson v. Waldron, 13 Wend. 178; Wightman v. Reynolds, 24 Miss. 675; Goodrich v. Bryant, 5 Sneed, 325; Heilner v. Battin, 27 Pa. St. 517; Hills v. Lansing, 24 Eng. L. & E. 452.

<sup>3</sup> Kingsman v. Parkhurst, 18 How. 259; affirming S. C., 1 Blatchford C. C. R. 483; Heilner v. Battin, 27 Pa. St. 517.

<sup>4</sup> Gibson v. Gibson, 15 Mas. 106.

<sup>5</sup> *Somes v. Skinner*, 3 Pick. 52; *Fairbank v. Williamson*, 7 Me. 96.

<sup>6</sup> *Beaupland v. Keen*, 28 Pa. 124;

istence must always be a question of law for the court and not of fact for the jury. Estoppels, whether claimed as of record or *in pais*, must be such within the principles which give them force before they will be effectual. An estoppel may be used as a defense against a party who is thus precluded from his act or statement from maintaining his action ; or it may be used by the plaintiff to prevent or avoid a defense which is open to a similar objection. This doctrine at law gives rise to a kind of pleading that is neither by way of traverse, nor confession or avoidance, viz. : a pleading, that waiving any question of fact, relies merely on the estoppel, and after stating the previous act, allegation or denial of the opposite party, prays judgment if he shall be received or admitted to aver contrary to what he before said or did. This is a pleading by way of an estoppel.

§ 20. There is one general universal rule, applicable alike to estoppel by record, by deed, and to equitable estoppel or estoppel *in pais*, that is, that estoppels must be mutual. Strangers can neither take advantage of, nor be bound by an estoppel. Its binding effect is between the immediate parties, their privies, in blood, in law, and by estate.<sup>1</sup>

Philly v. Sanders, 11 Ohio S. 490 ; Carver v. Astor, 4 Peters, 1 ; Welborn v. Finley, 7 Jones, 228.

<sup>1</sup> Ray v. Gardner, 82 N. C. 146 ; Schenck v. Stump, 6 Mo. App. 381 ; Glasgow v. Baker, 72 Mo. 441 ; Tousley v. Johnson, 1 Neb. 95 ; Coby v. Wilson, 71 Ill. 207 ; Gibson v. McCarthy, Cas. T. Hard. 311 ; Longwell v. Bentley, 3 Grant's Cases, 177 ; Miller v. Holman, 1 Grant Cas. 243 ; Schuman v. Garratt, 16 Cal. 100 ; Hempstead v. Easton, 33 Mo. 142 ; Whittaker v. Garnett, 3 Bush, 402 ; Wood v. Pennell, 51 Me. 52 ; Hill v. Epley, 31 Pa. St. 331 ; Cuttle v. Brockway, 32 Pa. St. 45 ; Louis v. Castleman, 27 Tex. 407 ; Alexander v. Walter, 8 Gill, 239 ; Wright v. Hazen, 24 Vt. 143 ; Bentley v. Cleveland, 22 Ala. 814 ; Edmundson v. Montague, 14 Ala. 370 ; Watson v. Hewett, 45 Tex. 372 ; Simpson v.

Peason, 31 Ind. 1 ; Massure v. Noble, 11 Ill. 536 ; Griffin v. Richardson, 11 Ired. 439 ; Montgomery v. Gordon, 51 Ala. 377 ; Callow v. Jenkinson, 5 E. L. & E. 533 ; Deery v. Cray, 5 Wall. 795 ; Nutwell v. Tongue, 22 Md. 419 ; Williams v. Chandler, 25 Tex. 4 ; Allen v. Allen, 5 Pa. St. 573 ; Doe v. Errington, 8 Scott, 210 ; Water's Appeal, 35 Pa. St. 573 ; Sunderland v. Strothers, 47 Pa. St. 411 ; Catterlin v. Hardy, 10 Ala. 511 ; Carver v. Jackson, 4 Pet. 1 ; Penrose v. Griffiths, 4 Binn. 231 ; Shedden v. Wurtz, 30 N. H. 104 ; Buffum v. Hutchinson, 1 Allen, 58 ; Choze v. Lowman, 20 Mich. 327 ; Jackson v. Bull, 1 Johns. 81 ; Jackson v. Brinkerhoff, 3 Johns. 101 ; Jackson v. Bradford, 4 Wend. 419 ; Kimball v. Blasdell, 5 N. H. 533 ; Carpenter v. Buller, 8 M. & W. 212 ; Cottle v. Sydnor, 10 Mo. 763 ;

§ 21. As we have now ascertained what an estoppel is and from whence it originated, we will now ascertain its operation

Bolling v. Mayor, 3 Rand. 586; Witherbee v. Sover, 23 Hun, 27; Braintree v. Higham, 17 Mass. 432; Harrison v. Armstrong, 92 Ill. 442; Worcester v. Green, 2 Pick. 425; Russell v. Farquhar, 55 Tex. 355; Griggs v. Smith, 12 N. J. L. 23; Shumake v. Nelms, 25 Ala. 120; Miles v. Miles, 8 W. & S. 135; Langston v. McKinnie, 2 Murph. 67; Kitzmiller v. Rensselaer, 10 Ohio St. 63; Wolcott v. Knight, 6 Mass. 418; Gray v. Harrison, 2 Hayw. 292; Box v. Lawrence, 14 Tex. 556; Walton v. Walton, 80 N. C. 26; Wenman v. McKenzie, 5 E. & B. 447; Wark v. Willard, 13 N. H. 389; Canal Co. v. Hathaway, 8 Wend. 480; Cohoes Co. v. Goss, 13 Barb. 137; R. R. Co. v. Schuyler, 38 Barb. 534; Watson v. Hewitt, 45 Tex. 472; Dempsey v. Tylee, 3 Duer, 73; Smith v. Knowles, 2 Grant Cas 431; Averill v. Wilson, 4 Barb. 180; Langer v. Felton, 1 Rawle, 141; McDonald v. King, 1 N. J. L. 432; Carter v. Bennett, 4 Fla. 352; Smith v. King, 81 Ind. 217; Chandler's Appeal, 100 Pa. St. 262; R. v. Haughton, 1 E. & B. 560; Bell v. Hoagland, 15 Miss. 360; Myers v. Johnson, 14 Iowa, 47; Chamberlain v. Carlisle, 26 N. H. 540; Grosshorn v. Thomas, 20 Md. 234; Simpson v. Jones, 2 Sneed, 36; Biddley v. Johnson, 49 Ga. 412; Dock Co. v. Mayor, 53 N. Y. 64; Crab v. Laikin, 9 Bush, 154; Daniels v. Henderson, 49 Cal. 245; Manf. Co. v. Pice, 4 Rich. 338; Berlin v. Norwich, 10 Johns. 229; Wallis v. Truesdell, 6 Pick. 455; James v. Landen, Cro. Eliz. 37; Breton v. Evans, Cro. Eliz. 700; Philpot v. Philpot, 1 E. L. & E. 339; Bolling v. Mayor, 3 Rand. 563; Lansing v. Montgomery, 2 Johns. 382; Middleton v. Pollock, L. R. 4 Ch. D. 49; Bradley v. McDaniel, 3 Jones L. 128; Louis v. Trustees, 109 U. S. 162; Thomasson v. Odum, 31 Ala. 108; Comstock v. Smith, 26 Mich. 306; Harrison v. Armstrong, 92 Ill. 442; Russell v. Farquhar, 55 Tex. 355; Shumake v. Nelms, 25 Ala. 120; Preble v. Supervisors, 8 Biss. 358; Shirley v. Frame, 33 Miss. 653; Timon v. Whitehed, 53 Tex. 290; Masterson v. Pullen, 62 Ala. 143; Schnauth v. Bank, 8 Daly, 106; Dickerson v. College, 100 U. S. 578; Hart v. Bank, 39 Vt. 252; Stinchfield v. Emerson, 53 Me. 465; Schenck v. O'Neil, 23 Hun, 209; Fitzsimons v. Joselyn, 21 Vt. 129; Burton v. Farinholt, 62 N. C. 260; Maduska v. Thomas, 6 Kas. 153; McKellup v. Jackman, 50 Vt. 71; Fertilizer Co. v. Guano Co., 19 Hun, 47; Montgomery v. Sarmory, 99 U. S. 482; Morris v. Gentry, 89 N. C. 248; Heroman v. Louisiana, 34 La. Ann. 805; Walsh v. Agnew, 12 Mo. 520; Radford v. Folsom, 3 Fed. R. 109; Belcher Co. v. Deferrari, 62 Cal. 160; Goodenow v. Litchfield, 59 Iowa, 226; Fraser v. City Council, 19 S. C. 384; Corcoran v. Canal Co., 94 U. S. 741; Grimmet v. Henderson, 60 Ala. 521; McWilliams v. Kalbach, 55 Iowa, 110; Dennie v. Smith, 129 Mass. 143; State v. Gorman, 75 Mo. 370; Cooley v. Warren, 53 Mo. 166; Decour v. Morrison, 2 Grattan, 250; Greely v. Smith, 1 M. & W. 181; Bank v. Babcock, 3 Hill, 152; Leland v. Tousey, 6 Hill, 327; Chirac v. Reinacker, 11 Wheat. 286; Sergeant v. Salmon, 27 Maine, 539; Parsons v. Copeland, 33 Me. 370; Sheldon v. White, 35 Me. 253; Cecil v. Cecil, 19 Md. 72; Trammell v. Thurmond, 17 Ark. 203; Whiting v. M. Ins. Co., 15 Md. 297; Wanzer v. De Baun, 1 E. D. Smith, 261; Moss v. McCullough, 5 Hill, 134; Lawrence v. Haines, 5 N. H. 33; Bennell v. West, 2 N. H. 32; Sewell v. Watson, 31 La. Ann. 589.

and effect as a defense which is at once final and conclusive ; and as we have already seen the number and kinds of estoppels, we will proceed now to treat of them in order, viz. :

I. ESTOPPEL BY RECORD ;

II. ESTOPPEL BY DEED OR WRITING ;

III. ESTOPPEL IN PALS, OR EQUITABLE ESTOPPEL :

showing how they are used as against parties and things, whom they bind or estop, and in what their conclusiveness consists.

## CHAPTER II.

## ESTOPPEL BY RECORD.

SECTION 22. RECORDS.—A record is an instrument containing an account of the proceedings of a court of justice, particularly in an action of law, and intended as an authentic memorial of such proceedings. A history of the proceedings in an action at law, consisting of entries of the various acts of the parties and of the court, arranged in the order of their occurrence, expressed in the formal language prescribed by precedent, connected together by the peculiar entries called *continuances*, and terminating with the judgment of the court upon the whole matter. In England the peculiar material upon which the record has always been written forms an essential part of the definition of the word. Hence Lord Coke has defined a record to be “a memorial or remembrance in *rolls of parchment*, of the proceedings and acts of a court of justice.” “A record signifies a *roll of parchment* upon which the proceedings or transactions of a court are entered or drawn up by its officers, and which is then deposited in its treasury, in *perpetuam rei memoriam*.”<sup>1</sup> In the United States paper has universally supplied the place of parchment as the material of the record, and the *roll form* has on that account fallen into disuse; but in other respects the forms of the English records have with some modifications been generally adopted. A record is “a memorial of a proceeding or act of a court of record, entered in a roll for the preservation of it.”

§ 23. The use of records, in the technical sense, is altogether peculiar to the common law, and they have always been regarded by that law with very peculiar consideration, constituting the only strict and proper proof of the proceedings of the court in which they are preserved; they are also regarded as proof of

<sup>1</sup> 3 Steph Com. 533.

so transcendent and absolute a nature as to admit of no contradiction, or, in Lord Coke's language, they "import in themselves such incontrollable credit and verity, as they admit no averment, plea or proof to the contrary." The peculiar privilege of some courts to have these memorials has, of itself, created the great leading distinction, equally recognized in English and American law, between *courts of record* and courts not of record. The practice of recording peculiar to the common law, is essentially of Norman origin.<sup>1</sup> The term *record* is itself, in its immediate derivation, French, or rather it is a French word adopted in English without change, as appears from the use of it. "*Et en tiel cas volons que lour roules portent record*;" "and in such case we will that their rolls shall bear or carry record, that is, shall have the force of record." "*Enroulement de court que porte record*;" enrollment of a court which bears record, that is, of a court of record."<sup>2</sup>

§ 24. Record is from recorder; and the latter word anciently signified, in the Norman law, to recite or testify on recollection, as occasion might require, what had previously passed in court, which was the duty of the judges and other principal persons who presided at the *placitum*—thence called *recordeurs*.<sup>3</sup> In fact, all over France, at this early period, the only mode of proving what took place in the courts, seems to have been by the testimony of witnesses, by whom they proved what had been already done, said or judicially decreed (on prouvoit par temoins ce qui s' étoit déjà passé, dit on ordonné en justice). This was called the proceeding by record (par ce que s'appelloit la procedure par record).<sup>4</sup>

§ 25. The proper original of the English record is considered to have been an occasional memorandum drawn up by the Francic pleader to confirm the recollection of his judges, and which, by a gradual progress, took the shape of an official contemporaneous minute of the proceedings; and, no longer merely subordinate to a record or judicial report, became itself invested with that name and character. Whether this change had fully taken place at the date of Granville's treatise (in the reign of Henry II.), that work

<sup>1</sup> Steph. Pl. App. note 11.

<sup>2</sup> Britt. c. 1 & 28.

<sup>3</sup> Steph. Pl. App. note 11.

<sup>4</sup> Esprit des Loix, liv. 28, c. 34.

does not enable us accurately to decide. However, at least very shortly after this period, the practice of recording, in the present sense of the term, was in full operation. The series of records, now extant, begins with the reign of Richard I., and the earliest of them are to be found in the collection called *Placitorum Abbreviatio*.<sup>1</sup> Bracton frequently refers to the *irrotulationnes* (enrollments), as important parts of the proceedings in an action, and gives forms of them, also in citing the judicial decisions of that period, mentions the *rotuli* or rolls on which they were recorded, distinguishing in what part of the roll the case was to be found.<sup>2</sup>

The ancient record was, as its form clearly indicates, a contemporaneous minute of the proceedings in an action, drawn up by an officer of the court, containing an entry of every act done in court, either by the parties or by the court itself, which (as everything done in an action was then done in open court), embraced all the proceedings in the suit—the appearances and pleadings of the parties, prayer and allowance of imparlance, prayer and allowance ofoyer, award of jury process, proceedings at the trial, verdict of the jury and judgment of the court, with the various intermediate and incidental proceedings. Its contemporaneous character appears everywhere on its face, the proceedings being uniformly entered in language of the present tense, and as of present occurrence. The plaintiff “complains,” and “brings suit;” the defendant “comes and defends,” and “prays judgment;” the “jury come” and “say upon their oath;” and the judgment of the court is, that “it is considered, etc.” Another distinctive feature of the old record was its continuances or the entries of the adjournments of the court from one day or term to another, by which the parties were temporarily dismissed and appointed to appear again, and by which its various parts were at the same time most effectually connected together. It was this peculiar principle of construction, by which the record was made to follow the action step by step, and to reflect every proceeding in it, just as it occurred, which gave it from an early period the stamp of the very highest authority as a judicial memorial. Kept constantly under the eye of the court, and by its own officer, it necessarily became the evidence in itself, of what it

<sup>1</sup> Steph. Pl. App. note 11.

<sup>2</sup> Bract. fol. 16.

contained admitting of no extrinsic proof whatever. The great and obvious importance of the record in this particular, led to a corresponding degree of care in framing it. By the consummate skill of the Anglo-Norman pleaders; its language was gradually elaborated to the highest degree of precision and uniformity; its various parts studiously adapted to each other and logically fitted together until, by the force of constant repetition, and under the sanction of the courts for a succession of centuries, the whole instrument settled at last into a fixed form of expression which admitted of no variation. In this way, the record came to be, at an early period, and before the discontinuance of oral pleadings, next after the original writ, the most important document in an action, prescribing, indeed, the form of all the other proceedings, which constituted its component parts. This is very forcibly shown in the fact that, when written pleadings were introduced, they were framed precisely as they had before appeared on the record, and were virtually mere extracts from it.<sup>1</sup>

Hence arose what has always been a leading principle of practice: that every proceeding in an action intended or required to appear on the record, must be framed in the language of the record, and with reference to its place on that instrument, or, in other words, must be framed with the same exactness as the record itself.

§ 26. Two circumstances, in addition to what has been mentioned, contributed to stamp the record with that character of immutability which has accompanied it down to modern times, and almost to the present day. One was the circumstance of its being kept in Latin, a language admitting of no variation, and the other, the character of inviolability, which preserved it from the slightest degree of alteration after it had once been made up. The substitution of English for Latin as the language of the record, and of ordinary writing for "the ancient and immutable court-hand," which took place in the reign of George II., were innovations upon the ancient system apparently demanded by the times, but viewed by highly competent judges of the period with much apprehension as to their effect upon the durability of the record as a memorial of the proceedings in an action. How

<sup>1</sup> Steph. Pl. 35.

far these apprehensions have been realized in the particular way anticipated, is for each practitioner to determine; but that they have been realized in the general result of impairing the character of the record by reducing it to the level of an ordinary instrument, privileged in no peculiar manner from change, seems apparent in the material alterations which have at length been effected in the structure of this once inviolable and immutable memorial of judgment. These changes consist principally in omitting all or most of those entries by which the several parts of the record were formerly connected together (including the entire system of continuances), by omitting the formal commencements and conclusions of pleadings, which were in fact portions of the record itself, connecting with the pleadings, and by the general modification of the pleadings themselves. In this way the unity of the record has been effectually broken up, and the symmetry of its parts and the uniformity of its language, once thought to constitute its peculiar value, have been obviously impaired. In some of the United States, similar modifications of the form of the record have been adopted, going in some instances to much greater lengths. The modern tendency undoubtedly is to place this instrument, in point of dignity and importance, far below the position it once occupied. This record, when properly signed, constitutes the legal evidence of the judgment, and entitles the party obtaining it to issue execution. They were accurate transcripts of all the proceedings, papers and process in the action, but there have been great innovations in this practice, and they are not as full and complete as they were in olden times, but their authority has not been lessened to any great extent.

§ 27. A record is, therefore, a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said or done, and may be divided into three classes. First, those which relate to legislative proceedings; second, the courts of common law, the courts of chancery, and those which are made so by statutory provision. A record imports such absolute verity that no person, against whom it is admissible, shall be allowed to aver against it.<sup>1</sup>

<sup>1</sup> Co. Litt. 260 a; Gilbert, Ev. 5; Glyn v. Thorp, 1 B. & A. 173; Mur-

*Recorda sunt vestigia vetustatis et veritatis.* A party cannot be allowed or received to aver, as error in fact, a matter contrary to the record.<sup>1</sup> As an instance of the conclusiveness of a record, the case of the *King v. Carlisle*,<sup>2</sup> may be cited. There the defendant had been convicted of a crime, and brought error to an appellate court, assigning as error that there was but one judge on the bench when there should have been more at the time of the trial. The record was made up in the ordinary way, showing that the court below had regularly entered judgment against him. The appellate court, Lord Tenterden delivering the opinion, held that a record imports such absolute verity that a party could not aver as error in fact a matter contrary to that record; while in the first, Justice Coke says: The rolls or memorials of the judges of the courts of record import in them such uncontrollable credit and verity as to admit of no averment, plea or proof to the contrary; and if such a record be alleged and it be pleaded *nul tiel record*, it shall be tried only by itself; for otherwise there would never be an end of litigation.<sup>3</sup>

§ 28. Whatever, therefore, on the face of a book of record has been duly authenticated by the signature of the judge, must

rah v. State, 51 Miss. 652; Herring-ton v. McCollum, 73 Ill. 476; Kem-per v. Waverly, 81 Ill. 178; Farley v. Budd, 14 Iowa, 289; Philpot v. Adams, 7 H. & N. 888; McCoy v. State, 22 Ark. 308; Hubbard v. Fisher, 25 Vt. 539; Fitzgerald v. Top-ping, 48 N. Y. 438; Humphreyville v. Culver, 73 Ill. 485; R v Hopper, 3 Pri. 495; Gray v. State, 63 Ala. 66; Winchester v. Thayer, 129 Mass. 129; Netherland v. Johnson, 5 Lea, 340; Calvin v. State, 12 Ohio S. 69; U. S. v. Ambrose, 7 Fed. R. 554; Turrell v. Warren, 25 Minn. 9; State v. Holmes, 69 Ind. 577; Foss v. Bogan, 92 Pa. St. 96; State v. McDonald, 24 Minn. 48; Ridgway v. Morrison, 28 Ind. 201; Ray v. McMurtry, 20 Ind. 307; Ellis v. Mills, 28 Tex. 584.

<sup>1</sup> King v. Carlisle, 2 B. & A. 362; White v. Merritt, 7 N. Y. 353; People v. Sturtevant, 9 N. Y. 263; Corry v.

King, 49 Iowa, 365; Reed v. Whitton, 78 Ind. 579; Dixon v. Fisher, 1 W. Bl. 664; R. v. Shaw, R. & R. C. C. 526; Whistler v. Lee, Cro. Jac. 359; Hclbut v. Held, 2 Ld. Raymd. 1414; Plommer v. Webb, 2 Ld. Raymd. 1415

<sup>2</sup> 2 B. & A. 362.

<sup>3</sup> King v. Gosper, Yelv. 58; Palmer v. Webb, 2 Ld. Raymd. 1415; O'Keo-ver v. Overbury, T. Raymd. 231; Calvin v. State, 12 Ohio St. 59; Whistler v. Lee, Cro. Jac. 559; Molins v. Werby, 1 Lev. 76; Bowsse v. Carrington, Cro. Jac. 244; Cole v. Green, 1 Lev. 309; U. S. v. Ambrose, 7 Fed. R. 554; Reed v. Whitton, 78 Ind. 579; Reitzenberger v. Braden, 18 W. Va. 280; Carper v. McDowell, 5 Gratt. 212; Harkins v. Forsyth, 11 Leigh, 24; Taliaferro v. Prior, 12 Gratt. 277; Vaughn v. Common-wealth, 17 Gratt. 386; Quinn v. Com

be held to be an absolute verity, and it cannot be contradicted; and so also any paper actually referred to on the record-book as filed or as constituting a part of the record, is to be regarded as a part of the record, and is as much a verity as if it had been spread out at length as a part of the record. But it is only that which was actually on the record-book, when thus authenticated or that is actually contained in some paper so made a part of the record by reference, that is thus held to be an absolute verity. But if a record is interlined or erased in a material matter, and it is alleged that this was done after the record was made, by some unauthorized person, such alteration constitutes no part of the record, and an inquiry may be made into the genuineness of such altered record, and it may be proven by parol that such alteration was thus made by one not authorized to make it. This is not controverting the absolute verity of the record, but simply inquiring what really constitutes the record. If this were not allowed, the absolute verity attributed to a record could be used to give sanction to a forgery or to a fraudulent erasure of the record,<sup>1</sup> and where a bill of exceptions is taken, and the record is silent and the matters stated in the bill are contrary to the record, the record is unimpeachable. Thus, where "the judge of the circuit has stated in the bill of exceptions that it was his understanding that the first order was made without prejudice, and that it was inadvertently signed in its present form. The order of record is without qualification or reservation, and it must therefore be held to be conclusive until it has been modified in some proper way, and the statements of a judge, extra-judicially expressed, whether in a bill of exceptions or otherwise, cannot be taken to change or impeach the records of the court."<sup>2</sup>

monwealth, 20 Gratt. 138; *Brittain v. Kinnard*, 1 B. & B. 432; *R. v. Shaw*, R. & R. C. C. 526; *Iwin v. Grey*, 19 C. B. (N. S.) 585; *Leighton v. Leighton*, 1 Stra. 210; *Newton in re*, 19 C. B. 97; *Clark in re*, 2 Q. B. 619; *Hupper v. Allen*, L. R. 2 Exchq. 15; *Bourg v. Gerdin*, 33 La. An. 1369; *Gosling v. Warborton*, 1 Cro. Eliz. 128; *Ramsbotton v. Buckhurst*, 2 M. & S. 565; *Irwin v. Gray*, L. R. 1 C. P.

17; *Green v. Moody*, Golb. 384; *James v. Landon*, 1 Cro. Eliz. 36; *Owen v. State*, 55 Vt. 47; *Commonwealth v. Liquors*, 135 Mass. 519; *Thomas v. People*, 107 Ill. 517; *S. C.*, 47 Am. R. 458; *Macke in re*, 31 Kans. 54.

<sup>1</sup> *State v. West*, 21 W. Va. 800.

<sup>2</sup> *Walker v. Rogan*, 1 Wis. 597; *Attorney-General v. Lum*, 2 Wis. 507; *Rogers v. Hoenig*, 46 Wis. 361.

§ 29. Judgments and verdicts of courts are always of record. They have, therefore, the character which belongs to all records, that they cannot be contradicted by evidence.

Where a judgment is produced in which the record shows that there were several issues, the opposite party will not be allowed to aver that there was no evidence offered on one of the issues, or that the judgment as to that issue was entered by mistake.<sup>1</sup>

§ 30. If there were no limitations to this conclusive effect of records, courts of justice would become tyrannical inquisitions, inflicting, under the guise of justice, great hardships, wrong and oppression, by enforcing what might be termed edicts, surpassing all record of ancient tyranny and injustice, upon parties in no ways interested in the matter in dispute, which had been adjudged and finally concluded. There are, therefore, certain principles and considerations by which the conclusive effect of records are limited, laid down by Lord Coke and other eminent jurists.

§ 31. 1. *Where the record is coram non judice.* Where a court has no jurisdiction over the person, the cause or the process, as where an indictment purports to have been determined in a civil tribunal having no criminal jurisdiction.

2. *Where the truth appears in the same record.* As where defendant is sued by a wrong name, and enters into a bail bond *Prout* the writ, as he must, and then puts in bail by his right name; he who was arrested is not estopped from pleading in abatement, or where the record shows that the judgment relied on as an estoppel has been reversed in error.

3. *Where the matter alleged is consistent with the record.* A man is not estopped to aver a thing consistent with the record; as if A. B. senior, and A. B. junior, are bound by an obligation, it may be averred that A. B. junior, was intended.

4. *Where the allegation of the record is uncertain.* For an estoppel, not being favored by the law, ought to be certain to every intent, and not be taken by argument or inference; it ought to be a precise affirmation of that which makes the estoppel, as if it be said, *ut dicitur quia in personalitas, non concludet nec*

<sup>1</sup> Reed v. Jackson, 1 East, 355; Leighton v. Leighton, 1 Stra. 210  
Bourg v. Gerdin, 33 La. An. 1269.

*leget impersonal dicitur, quia sine persona;* and therefore if a thing be not directly and precisely alleged it shall be no estoppel.<sup>1</sup>

5. *Or is alleged merely by way of supposal.* In the words of Lord Coke: "Matter alleged by way of supposal shall not conclude after nonsuit; otherwise after judgment, and after nonsuit, notwithstanding the supposal in the count, shall not conclude, yet bar the title, replication, or other pleading, which is precisely alleged, shall conclude after nonsuit—and hereby are the books reconciled."

6. *If not traversable or material.* Where matter is neither traversable or material, it shall not estop, as for example: the day in an indictment, or a description of the nature of land in a lease, or as in a debt upon an obligation alleged to be made in A., in another action upon the same obligation, he may say it was made in B.<sup>2</sup>

7. *Estoppels must be reciprocal or mutual, that is to bind both parties,* and this is the reason that strangers shall not take advantage of nor be bound by an estoppel.<sup>3</sup>

8. *Where there is an estoppel against an estoppel.* In the words of Coke: "An estoppel against an estoppel setteth the matter at large, as a warranty against a warranty."<sup>4</sup>

9. *There is no estoppel where an interest passes.*<sup>5</sup> By which is meant that a grantee is not estopped from saying that a grant does not pass so great an interest as it purports to convey, though he is estopped from saying that it passes no interest at all.

§ 32. The principal limitation to the conclusive effect of a record, is that arising from the consideration, that, in most cases, it is not binding, or even evidence between all persons. Questions of this sort generally arise on *judgments*, they being by far the most extensive species of records.

§ 33. A judgment, sentence or decree is a judicial determina-

<sup>1</sup> Lajoie v. Princan, 3 Mo. 529; v. Smith, 12 N. J. L. 22; Langston Callow v. Jenkinson, 5 E. L. & Eq. 533. v. McKinney, 2 Murph. 67; see Ante, § 20.

<sup>2</sup> Attorney Gen'l v. King, 5 Price, 195; Skipwith v. Green, 1 Stra. 610.

<sup>3</sup> Callow v. Jenkins, 5 E. L. & Eq. 533; Massure v. Noble, 11 Ill. 351; Deery v. Crary, 5 Wall. 795; Williams v. Chandler, 25 Tex. 4; Griggs

<sup>4</sup> R. v. Haughton, 1 E & B 506.

<sup>5</sup> Treport's Case, 3 Co. 285; Andrews v. Pearce, 1 B. & P. N. R. 158; Doe v. Seaton, 2 C. M. & R. 728; Walton v. Waterhouse, 2 W. Saund. 829.

tion of a *cause of action* or *suit* agitated, litigated or contested between real parties upon which a real interest has been settled. Being the termination of an action or suit, we will ascertain what in action or suit is, and the nature and kinds of actions.

§ 34. A suit is the prosecution or pursuit of some claim, demand, or request. At law it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is the being put in possession of that right whereof the party is deprived. The instruments whereby this remedy is obtained are a diversity of suits and actions which are defined to be the lawful demand of one's rights, or, in the language of Justinian, "*Jus prosequendi in judicio quod alicui debetur.*" To commence a suit is to demand something by the institution of process in a court of justice, and to prosecute the suit is, according to the common acceptation of language, to continue that demand.<sup>1</sup> The term suit is a very comprehensive one and applies to any proceeding pending in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit or action.

§ 35. *Actio nihil aliud est, quam jus persequendi in judicio, quod alicui debetur.* An action is nothing else than the right of pursuing in court what is due to a person. Action (*actio*) is the name given to the means employed by one who alleges that his rights have been violated, to have them judicially determined and to have judicial assistance for their enforcement. He who invokes these means is termed (*actor*) plaintiff, and he against whom they are employed is termed (*reus*) defendant,<sup>2</sup> or as defined by Justinian, "*actio autem nihil aliud est, quam jus persequendi in judicio quod sibi debetur.*" When the issues are made up and decided, the next step in the suit or action, if the unsuccessful party has not avoided the effect of the decision, is the *judgment*. As the issue is the question the parties have by their pleadings selected for decision, and having put the fate of their cause upon that question, as soon as the issue is decided in favor of one of them, that party becomes the victor in the suit, and nothing

remains but to award the judicial consequence which the law attaches to success. The award of this judicial consequence is called the judgment, and is the province of the judges of the court. The nature of the judgment varies according to the nature of the action, the plea, the issue, and the manner and result of the decision. Judgments, with the exception of a *judgment respondeat ouster*, are of two kinds—*interlocutory* and *final*; interlocutory when there is some further action to be taken by the court; final, when there is no writ of inquiry necessary. Judgments are also awarded where there is no issue to be decided—as by confession, default, etc., and are either interlocutory or final.

Judgments, like pleadings, were formerly pronounced in open court, and are still always supposed to be so. But by a relaxation of practice there is now in general no actual delivery of judgment in court or elsewhere. The party entitled to judgment by his attorney usually prepares such an entry as he desires and submits it to the judge for his signature, and after signing, it is by the attorney delivered to the clerk of the court and entered on the records or in the manner provided by law. A final judgment is one that disposes or terminates the cause, and gives the party in whose favor it is rendered a right to enforce it by final process, by execution, etc. Final judgments being such as terminate an action, they may be used as a complete defense to the prosecution of another action involving the same matters between the same parties under the plea of *Res Judicata*.

§ 36. The chief classification of actions is that which divides them into actions *in rem*, and actions *in personam*. The former spring from *jus in re* or *dominium*, and are used where the plaintiff asserts a right of ownership, and the latter arise from *jus ad rem*, and are used where the plaintiff alleges the defendant to be bound towards him by an obligation *ex contractu*, or *quasi ex contractu*, or *ex delicto*, or *quasi ex delicto*.<sup>1</sup>

§ 37. BRACTON'S CLASSIFICATION OF ACTIONS.—*Personales verò actiones sunt, quae competunt contra aliquem ex contractu, vel quasi : ex maleficio, vel quasi : cum quis teneatur ad aliquid dant, vel faciendum, & locum habent adversus eum qui con-*

<sup>1</sup> Instit. L. IV. t. VI. § 1; L. III. t. § 530; Bowyer's Modern Civil Law XIV. § 2; Story, Conflict of Laws, p. 233.

*trahit, & haeredum suum, nisi fuit poenalis, & dicuntur actiones nativae, eo. g. nascuntur ex contractibus, & omnes per se personales actiones sunt ex contractu, sicut mutui, commodati, depositi, mandati, ex empto, vendito, locato & conducto.<sup>1</sup>*

*Actiones verò in rem sunt, quae dantur contra possidentum, qui nomine suo possident ex quacunque causa, & non alieno, qui habet re, vel possidet restituere possit, vel dñm nomine: ut si quis petat ab alio rem certa, fund' aliquem, vel terram, & se contendat habere jus & inde esse dominum, & persequatur rem illam, & non ejus precum nec ejus aestimationem, nec tantumdem quid sit ejusdem generis & sic res corporalis immobilis, quae petitur ex quacunque causa versus aliquem, qui nullo jure personali obligatus est.<sup>2</sup>*

*Est autem actio mixta, tam in rem q in psonam & ideo sunt mixtae, quia mixtam habent causam ad utrumq sicut est divisio hereditatis inter cohaeredes participes, vel de pro parte soror. Vel alio modo der pparte, secund quod res fuerit dividenda, ratione personarum, vel ratione rei, vel utriusq. \* \* \* Item mixta esse poterit & mixtam causam habere, secund quod fuerit rei persecutoria & poenalis & ita erit quaelibet actio in rem, persequitur errorem rem ipsam & poenam, propter in justam detentionem. Et eode modo de actione in rem & in personam & ita possit*

<sup>1</sup> Lib. 3 Ch. 3 f. 103. Personal actions, indeed, are such as may be brought against any one upon a contract or something like a contract; upon a tort or something like a tort, when any one is bound to give or to do something, and they have a place against him who has made a contract and against his heir, unless there be a penalty; and they are called native actions, from the fact that they are born out of contracts, and almost all personal actions arise out of a contract, such as borrowing, a lending, a deposit, a mandate, a purchase, a sale, a letting, a hiring.

<sup>2</sup> But actions for a thing are those which are allowed against a possessor

of it, who possesses it in his own name from whatever cause, and not in the name of another person, because he has the thing or possesses it, so that he may restore it or name the person who has control over it, as if any one claims land from another a certain thing, some estate or land, and contends that he has the right over it, and therefore is the owner, and he sues for that thing, and not its price or its value, nor an equivalent of the same kind, and so it is a corporeal immovable thing, which is claimed for whatever cause from some one, who is not bound by any personal right.

*esse mixta & mixtam habere causam quaelibet criminalis & civilis, sine oriatur ex maleficio vel quasi.*<sup>1</sup>

§ 38. ACTIONS CLASSIFIED BY GAIUS.—*Si quæritur, quot genera actionum sint, verius videtur duo esse: in rem et in personam. Nam qui IIII esse dixerunt ex sponsorium generibus, non animadverterunt quasdam species actionum inter genera se rettulisse.*

"It now remains to speak of actions. If one inquires how many kinds of actions there are, speaking more correctly, there appear to be two—real actions (*in rem*) and personal actions (*in personam*). For those who have said there are four kinds, according to the different kind of *sponsio*, have not observed that certain species of actions are included in the kinds that we have mentioned."

"The assistance and protection which the State gives to a private right is rendered by means of the *actio*, which is simply a transaction by virtue of which a violated right is protected or repaired. No private right is perfect and entire unless it be defended by an action. The claim which a man has to the protection which the State affords to his person and property is denominated his right of action. The so-called 'Actiones in personam' correspond to rights of persons. Rights *in rem*, on the other hand, give rise to the so-called 'Real Actions.' Personal Actions are those which may be brought against certain individuals, whilst 'Actiones in rem' can be brought against any person who violates a real right, as a right of property (*dominium*)."<sup>2</sup>

<sup>1</sup> But a mixed action is for a thing and against a person, and they are for this reason mixed, because they have a mixed cause of action for each, just as there is a division of inheritance among coparceners or for the proportionate share of sisters, or in another way, for a proportionate share according as a thing is to be divided in regard of the persons, or of the thing, or of both, . . . so an action may be mixed and have a mixed cause, according as it is in

prosecution of a thing and penal, and so it will be a kind of action for a thing, for it pursues the thing itself and the penalty on account of the detention. And in the same way respecting an action for a thing and against a person, and so a kind of criminal and civil action may be mixed, and may have a mixed cause, whether it arises from a tort or something like a tort.

<sup>2</sup> Gaius, pp. 581, 582, l. IV. § 1.

§ 39. "*In personam actio est qua agimus quotiens cum aliquo qui nobis vel ex contractu vel ex delicto obligatus est contendimus, id est cum intendimus dare, facere, præstare oportere.*"

That action is personal (*in personam actio*), in which we proceed against any one who is bound to us by contract (*ex contractu*), or by delict (*ex delicto*), that is to say, when we assert that he ought to give (*dare*), to do (*facere*), to perform (*præstare*)."

"*In rem actio est, cum aut corporalem rem intendimus nostram esse, aut jus aliquod nobis competere, velut utendi, aut utendi fruendi, eundi, agendi aquamve ducendi, vel altius tollendi vel prospiciendi. Item actio ex diverso adversario est negativa.* An action is real (*in rem actio*) when we maintain that a corporal thing is ours, or that some servitude (*jus*) appertains to us: as a mere use (*usus*), or a usufruct (*utendi fruendi*), or right of way (*eundi*), or of way for cattle (*agendi*), or of drawing water (*aquamve ducendi*), or of building higher (*altius tollendi*), or of prospect (*prospiciendi*). In these different cases our adversary has also against us a real action *negativa*. "*Ex diverso adversario*," that is to say, that he against whom an action *in rem* was brought (the defendant in the *actio confessoria*) might in his turn as plaintiff maintain that the claimant had no right to the property. The action, as already observed, was a real action when it was maintained that a corporal thing belonged to the plaintiff, or an absolute right, as for instance, a "usus," or a "usufruct," or "right of way." A real action pre-supposes a person the *subject* of the right and a thing, the *object* of the right. Ulpianus says: "*Actionem genera duo sunt in rem, quæ dicitur vindicatio et in personam quæ condictio appellatur. In rem actio est per quam rem nostram quæ ab alio possidetur petimus: et semper adversus eum est qui rem possidet. In personam actio est qua cum eo agimus qui obligatus est nobis ad faciendum aliquid vel dandum; et semper adversus eundem locum habet.*" Appellantur autem in rem quidem actiones vindicationes; in personam vero actiones quibus dare fieri oportere intendimus conditiones.

Real actions (*in rem*) are called vindications, but personal actions (*in personam*), in which we assert that the party must

<sup>1</sup> Gaius, p. 600, I. IV. § 2.

47); T. & L. Gaius, pp. 600, 601, L.

<sup>2</sup> L. 25, pr. Dig. de Obl. et Act (4, IV. § 3.

give or do something (*dare fieri oportere*) are named conditions.

The "*in rem actio*," is that action by means of which we claim a thing as belonging to and as subjected to our immediate legal dominium. Such an action was also called a "*vindicatio*." The term just mentioned was originally applied to that part of the "*legis actio*" which had for its object the formal adjustment or the possession of the thing in dispute, with the view to the introduction of a real action. Thus Gaius, enumerating such actions, says: "An action is real when we maintain that a corporal thing is ours, or that some servitude appertains to us," etc. And then he adds, "In these different cases our adversary has also against us a real action *negativa*." The gist of the question in a real action was the following: Does the corporal thing as asserted in the *Intentio* belong to the plaintiff? Again, in every real action there was a double *petitum*. First, that the *Judex* should acknowledge and declare the right of the actor or plaintiff; and, secondly, that this acknowledgment might be followed by a judgment in which the *Reus* or defendant should be condemned. The basis and foundation of the action is "*jus in re*," not merely, however, *dominium* or *proprietas*, which the Germans call "Eigenthum;" but also a "*jus in re aliena*." This is made manifest from the words of Gaius himself, for he enumerates actions arising from servitudes, or "*jura in re aliena*" amongst the real actions. The defendant in a real action is not a definite person, and hence his name does not appear in the *Intentio*, but the action is against any person who in any way violates the right of the plaintiff. As it is expressed, "*Contra quemcunque possidentem*." The leading maxim in regard to the "*vindicatio*," is the following: "*Ubi rem meam invenio ibi vindico*," or in other words, "*Rem ipsum persequore*." Actions "*in personam*" were called "*condictiones*"; a term which in its strict sense was applied to those actions that were "*stricti juris*," as distinguished from actions "*bonæ fide*." *Appellamus autem in rem quidem actiones vindicationes, in personam vero actiones quibus dare facere oportere intenditur condictiones.*" Sometimes, instead of the term "*vindicatio*" we find the expression

<sup>1</sup> Muhl. Instit. p. 55, Gai. IV. 3. 28.

<sup>2</sup> Instit. Rom. Law, part II. s.      <sup>3</sup> S. 15, Instit. de act. (4, 6.)

“*petitio*,” which denotes an “*actio in rem*,” in contradistinction from an “*actio in personam*.” Thus Papinianus says: *Actio in personam inferitur, petitio in rem, persecutio in rem, vel in personam rei persequendæ gratia.*”<sup>1</sup>

§ 40. ACTIONS DEFINED ACCORDING TO JUSTINIAN.—“*Omnium actionum quibus inter aliquos apud iudices arbitrosve de quacunque re quæritur, summa divisio in duo genera deducitur; aut enim in rem sunt, aut in personam. Namque agit unusquisque aut cum eo qui ei obligatus est vel ex contractu vel ex maleficio, quo casu proditæ sunt actiones in personam, per quas intendit adversarium ei dare facere oportere, et aliis quibusdam modis; aut cum eo agit qui nullo jure ei obligatus est, movet tamen alicui de aliqua re controversiam, quo casu pro ditæ actiones in rem sunt: veluti si rem corporalem possideat quis, quam Titius suam esse affirmet et possessor dominum se esse dicat; nam si Titius suum esse intendat, in rem actio est.*”

All actions whatever, by which any matter whatever is submitted to the decision of judges or of arbitrators, may be divided into two classes; for actions are either real or personal. Either the plaintiff sues the defendant, because he is made answerable to him by contract, or by a delict, in which case the plaintiff brings a personal action, alleging that his adversary is bound to give to, or to do something for him, or making some other similar allegation, or else the plaintiff brings an action against a person not made answerable to him by any obligation, but with whom he disputes the right to some corporeal thing, and for such cases real actions are given; as for example, if a man is in possession of land, which Titius maintains to be his property, while the possessor says that he himself is the proprietor, the action is real.<sup>2</sup>

*Æque si agat jus sibi esse fundo forte vel ædibus utendi fruendi, vel per fundum vicini eundi agendi, vel ex fundo vicini aquam ducendi, in rem actio est. Ejusdem generis est actio de jure prædiorum urbanorum; veluti, si agat jus sibi esse altius aedes suas tollendi, propiciendive, vel projiciendi aliquid, vel immittendi in vicini aedes.* So, too, if any one alleges that he has a

<sup>1</sup> L. 28. Dig. de oblig. (44 7.) L. 178, & Lemon's Gaius, pp. 602, 603, L. 4 s. 2, de verb. sig. (50, 16) Tomkins sec. 5.

<sup>2</sup> Justinian, l. 4, t. vi. § 1.

right to the usufruct of land, or of a house, or that he has a right of going or driving his cattle, or of conducting water over the land of his neighbor, the action is real; as also are actions relating to prædial servitudes, as when a man alleges a right to raise his house, a right to an uninterrupted view, a right to make part of his house project, or of inserting the beams of his building into his neighbor's walls.<sup>1</sup>

*Sequens illa divisio est, quod quædam actiones rei persequendæ gratia comparatæ sunt, quædam pænæ persequendæ, quædam mixtæ sunt.*

Actions may be next divided into actions given to recover the thing, actions given to recover a penalty, and mixed actions.<sup>2</sup>

*Rei persequendæ causa comparatæ sunt omnes in rem actiones. Earum vero actionumque in personam sunt, eæ quidem quæ ex contractu nascuntur fere omnes rei persequendæ causa comparatæ videntur; veluti, quibus mutuum pecuniam vel in stipulatum deductum petit actor, item commodati, depositi, mandati, pro socio, ex exempto vendito, locato conducto.*

For the recovery of the thing are given all real actions; and of personal actions almost all those which arise from contract, as the action for a sum lent or stipulated for, a *commodatum*, a deposit, a mandate, a partnership, a sale, or a letting to hire.<sup>3</sup>

§ 41. Actions, according to their foundation, are either *in rem* or *in personam*.

1. The action *in rem*, in a wide sense, denotes every action founded on an absolute right, and which therefore may in general be instituted against any one who invades or disputes such right. In this wide sense it comprises also the preliminary actions (*actiones præjudiciales*), *i. e.*, those actions instituted for the determination of preliminary matters on which other litigated matters depend. This, by the Justinian law, only arises in the determination of status and family rights. In a narrow sense, actions *in rem* signify actions for property and real rights and for the enforcement of rights of inheritance. These actions are also termed in the Roman law *vindicationes*. The object of actions *in rem* is for the purpose of a judicial recognition of the plaintiff's right and to stop its violation.

<sup>1</sup> Justinian, l. vi. t. vi. § 2.

<sup>2</sup> Justinian, l. iv. t. vi. § 16.

<sup>3</sup> Justinian, l. iv. t. vi. § 17.

2. Actions *in personam* are those which are instituted for the fulfillment of an obligation, and hence can only be instituted against the person who is bound to fulfill it (the debtor). These actions are as various in their grounds as are the obligations for whose fulfillment they are instituted. The personal actions embrace the so-called actions *in rem scriptæ*, that is, actions arising from obligations, which may be instituted against the possessor or an owner of a thing as such, for an injury suffered by another in consequence of such ownership or possession, such as noxal actions, that is, actions against the child's father or the slave's master for injuries perpetrated by the child or slave; but subsequently they were limited to injuries by a slave only and not for injuries by a child. The division of mixed actions which is sometimes made as being partly real and partly personal is incorrect.<sup>1</sup>

§ 42. *Judicium a non suo judice datum nullius est momenti.*"

In order to make a judgment, sentence or decree, there must be a real interest, a real argument, a real prosecution, a real defense, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit. There is no judge; but a person, invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question. It is the decision or sentence of the law, which is pronounced by a judge or court upon matters contained in the record of an action which has been prosecuted or litigated before such judge or court; and the final proceeding in an action at law, by which the court applies the law to the particular case presented before it, and specifically grants or denies to the plaintiff the remedy which he has sought by the action; and if the defendant sets up a claim by way of affirmative relief, claim, or defense, such right is also determined and declared. In every action which is prosecuted to its final termination, the litigant parties present to the court the facts and agreements to be considered, and the points of law to be resolved; and the judgment is the result of a full determination of all these matters, while the judge or court pronounces the decision; it is the decision ~~or sen-~~

<sup>1</sup> Mackeldey's Roman Law, § 208, p. 175.

tence of the law, and the court or judge is the mere instrument for expressing the determination of the law.

§ 43. The definition of a judgment cannot be better expressed than is done by Bracton, as follows :

*“ Et sciendum quòd iudicium est in qualibet actione trinus actus trium personarum iudicis, viz., actoris, & rei, secundum quod largè accipi possunt huiusmodi personæ, s. quòd due sint personæ ad minus, inter quas vestatur contentio, & tertia persona, ad minus, qui iudicet, alioquin non erit iudicium, cum istæ personæ sint partes principales in iudicio, sine quibus iudicium consistere non potest. Iudex verò sive iustitiarius, uti debet veritate, & veritas iudicii in tribus consistit, s. in indifferenti and aquali personarum susceptione, ut legitur in Deuteronomio, audite illos, & quòd justum fuerit, iudicate ; sive civis sit iste, sive peregrinus, nulla erit distantia personarum, ita parvum audietis ut magnum, nec accipietis cujusquam personam quia Dei iudicium est. Item in eodem libro capitul 16, non accipies personam, nec munera, quia munera excecant, &c., ut infra de justic. Item consistit in diligenti examinatione, via oportet iudicem cuncta rimari. Hoc intelligens Job, ait, 29. Causam, quam ignorabam, diligentis sinè investigabam, non enim dicit diligenter vel diligentius, immo diligentissimè. Debet enim iudex p examinationem de dubiis facere certum, and de credulitate veritatem, de ignorantia notitia & notorium, sive notitiam de ignoto. Item consistit veritas iudicii, in justa sententiæ prolatione, & justa & diligenti executione, ut in Deuteronomio XVI. Juste q justum est psequeris, ut vivas & possideas terram, quam Dominus Deus datur est tibi. Et secundo libro Paralipomenon, 19, ubi dicitur. Videte quid faciatis, non enim hominis exercetis iudicium sed Dei, and illud idem q iudicaveritis, in vos redundabit, sit timor Domini vobiscum, and cum diligentia cuncta facite.”*<sup>1</sup>

<sup>1</sup> And it is to be known that a judgment is in each action a threefold act of three persons, namely, the judge, the plaintiff and the defendant, according to what may be loosely said of such persons, namely, that there are two persons at least between whom the contention turns, and a third per-

son, at least, who is to judge; otherwise there will not be a judgment, since these persons are the principal parties in a judgment, without whom a judgment cannot take place. But a judge or a justice ought to use truth, and the truth of a judgment consists of three things, namely, in an impartial and

And again :

*“ Actor verò, sive sit petens sive querens, uti debet intentione. Docere enim debet, & ratione prætere, quod ipsum ptineat actio, & q pars esse possit in judicio, ponere enim debet corà eo, qui jus dicturus est, intentione suam, & illam fundare and p bare. Reus vero uti debet exceptione & defensione, secundùm quod inferiùs dicet plenius.”*<sup>1</sup>

*“ Oportet etiam, quòd ille qui judicat, ad hoc quòd ratu sint judicia, habeat jurisdictionem ordinariam vel delegatam, & non sufficit quòd jurisdictionem habeat, nisi habeat coercionem, quòd si judicium suum executioni demandare non posset, sic essent judicia delusoria. Non enim habet ordinarius jurisdictionem and executione in omni causa, cùm jura sint separata & limitata.”*<sup>2</sup>

equal acceptance of the persons, as it is read in Deuteronomy: “hear them, and judge what is just,” whether he be a citizen or a stranger, there shall be no distinction of persons, you shall hear the lowly equally as the great; neither shall you respect the person of any one, because it is the judgment of God. Likewise, in the same book (chapter 16), thou shalt not respect persons, neither take a gift, for gifts blind (the eyes of the wise), &c, as below concerning justices. Likewise, it consists in a diligent examination, for a judge ought to search out every thing. Understanding this, Job says (chapter 29): “The cause which I knew not I searched out most diligently,” for he does not say “diligently,” or “more diligently,” but “most diligently.” For a judge ought by examination to make certainty out of doubtful things, truth out of things believable, knowledge out of ignorance, things well known out of things unknown. Likewise, the truth of a judgment consists in the just pronouncement of a sentence and in the just and diligent execution of it, as in Deuteronomy (chapter 16): “Thou

shalt pursue justly what is just, that thou mayest live and possess the land which the Lord thy God is about to give thee.” And in the second book of the Chronicles: “Take heed what you do, for you do not exercise the judgment of man, but of God, and that which you judge the same shall redound to you; let the fear of the Lord be with you, and do all things with diligence.” Bracton, l. 3, c. viii. § 2. De Legibus Angliæ.

<sup>1</sup> But the plaintiff, whether he is a petitioner or a complainant, ought to state the issue. For he ought to show and maintain by argument that he has a right to the action, and that he may be a party to the judgment, for he ought to set forth before him who is to give judgment, the issue, and to found it and to prove it. The defendant, on the other hand, ought to state his demurrer and his defense, according as will be stated more fully below.” Bracton, l. III. c. 8, § 3, De Legibus Angliæ.

<sup>2</sup> It is requisite also that he who judges, in order that his judgments should be ratified, should have jurisdiction, ordinary or delegated, and it

*Est autem eorum potestas, quòd ex quo eis commissæ est causa una vel plures, licet simpliciter, extenditur eorum jurisdictio ad omniũ, sine quibus causa terminari non potest, quantum ad iudicium et executionem iudicii.*<sup>1</sup>

§ 44. Burgundus, divides judgments (Sententia), into three classes: 1. *In rem*; 2. *In personam*; 3. Mixed *in rem* et *in personam* "*Omnium condemnationem summæ divisio, pariter intra genera deducitur aut cinim in rem, aut in personam, aut in utranque concipiuntur. In rem quoties dicitur res, asseritur, hoc est ejus esse dicitur vel jure creditoris, aut alio modo possidentur datur. In personam, si condemnitur ad aliquid dandum aut non faciendum, vel si personæ statui, official. In utramque, si set es, et personæ simul in condemnationem veniant.*" The first respects things either the proprietary right or ownership, or the right of possession of a creditor or some other right or title. The second respects the quality, state or condition of persons, and pronounce against them judgments purely personal *ad dandum, aut faciendum, aut non faciendum*. The last respects both persons and things, either in adjudging the property to one, or pronouncing against him a personal judgment for the benefit of the other and adjudging the other to make restitution of the profits to him, so that it is the title of the action which characterizes it.<sup>2</sup>

§ 45. In regard to their conclusiveness, judgments may be divided into two classes:

1. Judgments *in rem*.
2. Judgments *in personam* or *inter partes*.<sup>3</sup>

An adjudication upon the status of a particular person has as

is not sufficient that he have jurisdiction unless he has coercive power, for if he cannot carry his judgment into execution, his judgment would be illusory. For a judge ordinary has not the jurisdiction and the power to enforce it in every case, since rights are separated and limited. Bracton, l. III. c. 8, § 4. De Legibus Angliæ.

<sup>1</sup> But their power is, that from the time when a cause, one or more, has been committed to them, although singly, their jurisdiction is extended

to all things, without which the cause cannot be determined, as far as regards the judgment and the execution of the judgment." Bracton, l. III. c. 10, § 3. De Legibus Angliæ.

<sup>2</sup> Boullenois Obs. 25 P. 601, 602.

<sup>3</sup> Duchess of Kingston case, 20 Howell, St. T. 478; Earl of Bandon v. Beecher, 3 Cla. & F. 510; Reg. v. Inhabitants, 4 E. & B. 780; Cammell v. Sewell, 3 H. & N. 617; Simpson v. Fogo, 20 L. J. Ch. 657; Castrique v. Imrie, 8 C. B. N. S. 405.

conclusive an effect as an estoppel as a judgment or decree *in rem*, which is an adjudication upon the status of a particular inanimate thing; that renders the thing *ipso facto*, what it declares it to be.

In regard to both these classes of judgments, one important fact or principle must not be overlooked, and that is, that for the purpose of proving its own existence, the production of a record is conclusive upon the whole world;<sup>1</sup> the record of the judgment is generally produced in evidence, not for the purpose of proving the fact of its own existence, but for that of concluding some party upon the point adjudicated; and here arises the distinction above adverted to, between judgments *in rem* and judgments *inter partes*; the former having this conclusive effect, the effect of the latter being much more limited.

§ 46. There are numerous legal questions that arise from the simple fact that there has been a judgment rendered in an action by a court of competent jurisdiction. It may constitute part of a title, or be used to show that a controversy has been adjudicated, or as a means of letting in certain testimony used on a former trial, or in justification of proceedings in execution of the judgment, or to entitle a partner to contribution, or for any purpose to which a judgment is properly applicable, while a judgment against one man is generally no evidence against another. Yet, where A. sues B. for negligence as his agent, he can prove the consequences of the negligence to himself, by producing the record of a judgment against him by a third party; the record in such cases is evidence as to the amount of damages, but not as to the fact of the injury.<sup>2</sup>

§ 47. Justinian says:<sup>3</sup> "*Item, si iudicio tecum actum fuerit, sive in rem, sive in personam; nihilominus obligatio durat; et ideo ipso jure de eadem re postea adversus te agi potest sed debes per exceptionem rei judicatae adjuvari.*" In order to be protected by a former judgment upon the plea of *res judicata*, there must be a union of several essential elements. 1. The judgment must be a final judgment of condemnation or acquittal. 2. It

<sup>1</sup> Ansley v. Carlos, 9 Ala. 973; 4 T. R. 590; Rex v. Hebden, Bullers  
Maple v. Beach, 43 Ind. 51; Dorrell N. P. 231; Pritchard v. Hitchcock, 6  
v. State, 83 Ind. 357. M. & G. 151; Tyler v. Ulmer, 12 Mass.

<sup>2</sup> Green v. New River R. R. Co., J. 166.

<sup>3</sup> Lib. 4, t. 13, § 10.

must be a valid judgment. 3. It must be a judgment on the merits.<sup>1</sup> *Res judicatae dicitur quae finem controversiarum pronuntiatione judicis accipit, quod vel condemnatione vel absolutione contingit.* Interlocutory judgments or orders cannot have the effect of *res judicatae* for the reason that they do not dispose of or terminate the cause.<sup>2</sup>

§ 48. Judgments and decrees having the authority of *res judicatae* are first, those rendered in courts of final or last resort; or, those against which an appeal is not allowed, either because of some statutory provision fixing the amount in controversy from which an appeal is allowable, as in the United States courts, where no case involving less than five thousand dollars is reviewable in the Supreme Court of the United States, or cases in which the parties have failed to procure and perfect their appeal within the statutory time allowed. Second, where the parties have acquiesced in the judgment or voluntarily satisfied it. Judgments and decrees of all courts whose proceedings are reviewable by an appellate tribunal have the force and effect of *res judicatae* when rendered; that

<sup>1</sup> Lampon v. Kedgwin, 1 Mod. 207; Hitchin v. Campbell, 2 W. Bl. 779; R. v. Sheen, 2 C. & P. 634; R. v. Clark, 1 B. & B. 473; R. v. Vandercornb, 2 Lea, 708; Green v. Clark, 12 N. Y. 343; Weathered v. Mays, 4 Tex. 387; Witcher v. Oldham, 4 Sneed, 220; Houston v. Musgrove, 35 Tex. 590; Taylor v. Larkin, 12 Mo. 103; Dwyer v. Goran, 29 Iowa, 126; Creager v. Walker, 7 Bush, 1; Vaughn v. O'Brien, 57 Barb. 491; Allison v. Hess, 28 Iowa, 38; Spicer v. U. S., 5 Ct. of Claims, 34; Howard v. Kimball, 65 Me. 308; Cook v. Burnley, 45 Tex. 97; Whittaker v. Bramson, 2 Paine, 209; Clark v. Young, 1 Cranch, 181; Birch v. Funk, 2 Met. 544; Stevens v. Dunham, 1 Black, 56; Griffin v. Seymour, 15 Iowa, 30; Kendall v. Talbot, 1 A. K. Marsh. 321; People v. Barlett, 1 John. 66; McDonald v. Rainor, 8 John. 442; Heikes v. Commonwealth, 26 Pa.

518; Hoover v. Mitchell, 25 Gratt. 387; Whitely v. State, 38 Ga. 50; Walder v. State, 40 Ala. 325; Wells v. Moore, 49 Mo. 229; Verheim v. Strickbein, 57 Mo. 326; Shelbrina v. Parker, 58 Mo. 327; Durant v. Essex Co., 7 Wall. 107; Hull v. Blake, 13 Mass. 155; Morton v. Sweetzer, 13 Allen, 134; Sweigert v. Berk, 8 S. & R. 305; Kauffelt v. Bauer, 9 W. & S. 93; Haws v. Tiernan, 55 Pa. 192; Gurney v. Seeley, 66 Ill. 500; McFarland v. Cushman, 21 Wis. 400; Houston v. Musgrove, 35 Tex. 594; Wixom v. Stevens, 17 Mich. 518.

<sup>2</sup> Rankin v. Barnes, 5 Bush, 20; Hughes v. Blake, 1 Mason, 515; Estill v. Taull, 2 Yerg. 467; New England, &c. Co. v. Lewis, 8 Pick. 113; Ford v. Doyle, 44 Cal. 635; but see Davis v. Deming, 12 W. Va. 246, where it is, after the term, when it settles part of a cause.

is, they give the party in whose favor they are rendered a right to enforce them by execution, and until reversed by some tribunal having such power, or superseded, as provided by law, they are final and conclusive; but when the time for appeal has expired, or the party fails to stay execution, it is a final judgment.<sup>1</sup> So when a party acquiesces in a judgment, as by making payment, he waives his right of appeal and can not question the judgment. The voluntary execution of a judgment is conclusive evidence of its being acquiesced in. A judgment not strictly and technically coming within the rule of *res judicata* can not be attacked or questioned by a party who has voluntarily acquiesced in it. It has the effect of *res judicata*. This principle<sup>2</sup> may be illustrated by a late case. Plaintiff was convicted and fined for a violation of a city ordinance. He paid his fine. *Held*, that he was not in a position to ask for a review of the proceeding, having voluntarily paid his fine. The court say: "There are certain rules which all courts recognize. For example: unless it is made to appear that the plaintiff may suffer injury in case of non intervention by the court, there is no ground for the remedy by *certiorari*;<sup>3</sup> and it must also appear that he has some substantial interest in the subject matter;<sup>4</sup> and that there is something material to be accomplished—something on which the judgment of the court can act effectively and work advantage to the plaintiff. If the state of the case is such that the contention cannot be otherwise than speculative, and no rights of the parties can be changed in point of law, it is not incumbent on the court to formulate opinions.<sup>5</sup> Our observations would be mere *dicta*, and unauthoritative. Passing to the return made to the *certiorari*, which must be regarded as conclusive,<sup>6</sup> we find that plaintiff, being charged with having disobeyed the ordinance, was convicted on his plea of guilty, and simply fined five dollars, without costs, and that he immediately satisfied the judgment by paying the fine. He voluntarily submitted to the conviction and

<sup>1</sup> *Lawton v. Green*, 64 N. Y. 326; *Bray v. Poillon*, 4 T. & C. 663; *Noble v. Powell*, 20 La. Ann. 121.

<sup>2</sup> *Canal Company v. Lizardi*, 20 La. Ann. 285; *Jamison v. New Orleans*, 12 La. Ann. 343.

<sup>3</sup> *Davison v. Otis*, 24 Mich. 23.

<sup>4</sup> *Colden v. Botts*, 12 Wend. 234.

<sup>5</sup> *People v. Phillips*, 67 N. Y. 582; *People v. Walter*, 68 N. Y. 403.

<sup>6</sup> *People v. Fire Commissioners*, 73 N. Y. 437.

discharged the entire penalty without the award of process.<sup>1</sup> Nothing remained in which the plaintiff could have legal interest, or anything which could be affected practically by any judgment or *certiorari*. An order of reversal would be a fruitless thing.<sup>2</sup> The voluntary payment of the money being conclusive proof of the party's acquiescence in the judgment, there was nothing to appeal from, and the judgment being unappealable it is final, and therefore *res judicata*. *Ad Solutionem dilationem petentem acquievisse sententiae manifeste Probatum.*"

§ 49. Among the various classes of judgments which have the force and effect of estoppel or *res judicata* there are many which are not rendered after a trial by a court or upon the verdict of a jury; yet they are accorded the same effect as though rendered after contest or upon verdicts or findings by courts. Among this class may be placed judgments by agreement or consent, by confession, by default, and also judgments confirming awards, reports of referees, or decrees upon reports of masters. A judgment on an award is to all intents exactly of the same force as a judgment on a verdict.<sup>3</sup> So a report of a referee, master, &c., which has been confirmed by the court to which it is made.<sup>4</sup> Orders of courts, when entered of record, are conclusive, and affidavits to the contrary are inadmissible.<sup>5</sup>

§ 50. A judgment by confession or default is conclusive evidence between the parties, of all the facts alleged in the complaint necessary to make out the cause of action, and of all the legal principles necessarily applied in order to entitle the plaintiff to recover on the facts alleged,<sup>6</sup> and is binding as *res adjudicata*. It is held that a judgment confessed by a husband in favor of his

<sup>1</sup> Wood v. Colvin, 2 Hill, 566; Craft v. Merrill, 14 N. Y. 456.

<sup>2</sup> Leavitt v. People, 20 Alb. L. J. 413; Carver v. U. S., 111 U. S. 609.

<sup>3</sup> Whitlock v. Crew, 28 Ga. 289; Shelbina, &c. Ass. v. Parker, 58 Mo. 327; Taylor v. Sindall, 34 Md. 38; Lowenstein v. McIntosh, 37 Barb 251.

<sup>4</sup> Jordan v. Volkenning, 73 N. Y. 300; Leavitt v. Dabney, 40 How. Pr. 275; Hotchkiss v. Platt, 7 Hun, 57; Armory v. Armory, 26 Wis. 562;

Bruner v. Ramsburg, 43 Md. 560; Knowles v. Joost, 13 Cal. 620; Dunbar v. Bittle, 27 Wis. 143; Hunter v. Stonebunne, 12 C. L. N. 42.

<sup>5</sup> Kemper v. Waverly, 81 Ill. 278.

<sup>6</sup> White v. Merrill, 7 N. Y. 352; Newton v. Hook, 48 N. Y. 676, Guest v. Brooklyn, 79 N. Y. 624; Ackley v. Westervelt, 86 N. Y. 448; Davies v. Mayor, 93 N. Y. 250; Coolbaugh v. Roemer, 30 Minn. 424; Hartson v. Shanklin, 57 Cal. 553; Goodrich v

wife is void.<sup>1</sup> Yet there can be no question but that a valid judgment may be thus rendered in favor of a wife for a debt created in good faith. The burden of establishing the *bona fides* of the transaction is upon the wife in the same manner and to the same extent as if the action were a contested one by the defendant. There is no difference in legal effect between a judgment confessed or for want of appearance or plea and a judgment on the verdict of a jury.

§ 51. When a matter in controversy between parties has been submitted to a competent judicial tribunal, its decision thereon is final between the parties until it has been reversed, set aside, or vacated; and the rule of *res adjudicata* applies not only to the judgments of courts, but to all judicial determinations, whether made by courts in ordinary actions or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination. It applies not only to judgments rendered after a litigation of the matter in controversy, but to judgments rendered upon default or confession.<sup>2</sup> It is said that *res adjudica-*

Hunton, 31 La. Ann. 582; Bull v. Rowe, 13 S. C. 355; Umfried v. Heberer, 63 Ind. 67; Dean v. Thacher 32 N. J. L. 476; Dunn v. Pipes, 20 La. Ann. 276; Derby v. Jacques, 21 Cliff. 425; Burchett v. Casady, 18 Iowa, 341; Grace v. Martin, 47 Ala. 135; Rock v. Leighton, 1 Salk. 310; Barney v. Goff, 1 Chip. 304; Craig v. Alston, 1 R. Conct. 123; Green v. Hamilton, 16 Md. 317; Bradford v. Bradford, 5 Conn. 127; Bush v. Ewer, Str. 1043; Mathews v. Lewis, 1 Anst. 7; Middleton v. Hill, Cro. Eliz. 588; Troxel v. Clark, 9 Iowa, 201; Ellis v. Mills, 25 Tex. 384; Scott v. Nesbitt, 2 Bro. 611; Fletcher v. Holmes, 25 Ind. 488; Stenett v. Kaster, 1 Ala. 404; Weikel v. Long, 55 Pa. 238; Kirby v. Fitzgerald, 31 N. Y. 417; Scoch v. Foreman, 2 Brews. 157; Bank v. Hopkins, 2 Dana, 395; Hope-town v. Ramsay, 1 Bell App. C. 69; Whittaker v. Brumson, 2 Paine, 209; Sherman v. Christy, 17 Iowa, 322;

Brown v. Mayor, 66 N. Y. 385; Gates v. Preston, 41 N. Y. 113; North v. Mudge, 13 Iowa, 496; Franklin v. Stagg, 22 Mo. 193; Twogood v. Elliott, 22 Iowa, 543; Snow v. Howard, 35 Barb. 55; Anderson v. Kimbrough, 5 Cold. 260; Secrist v. Zimmerman, 55 Pa. 446; Neusbaum v. Keim, 24 N. Y. 325; Sheldon v. Stryker, 34 Barb. 116; State v. Mangum, 6 Ired. 369; Cannon v. Hemp-hill, 7 Tex. 184; Fletcher v. Holmes, 25 Ind. 458; Hillsborough v. Nichols, 46 N. H. 379; Richmond, &c. Co. v. Shippen, 2 P. & H. 327; Allanson v. Stark, 9 A. & E. 255; Chamberlain v. Preble, 11 Allen, 370.

<sup>1</sup> Countz v. Markling, 30 Ark. 17.

<sup>2</sup> Gates v. Preston, 41 N. Y. 113; Newton v. Houck, 48 N. Y. 676; Brown v. Mayor, 66 N. Y. 390; Belling v. Craique, 31 Barb. 534; White v. Merritt, 7 N. Y. 552; Smith v. Hemstreet, 54 N. Y. 644.

*cata* is the decision of the court upon a contested matter between the parties; that when a judgment or decree is rendered by consent or is the result of a compromise it cannot be admitted a *res adjudicata*.<sup>1</sup> This doctrine cannot be sound on principle; it abrogates at one stroke the maxim, "*quod nemo bis vexari debet si constat curiæ quod sit pro undâ et eadem causa.*" If A brings, an action on a note and mortgage against B, alleging several causes of forfeiture,—such as non-payment of interest, taxes, insurance, and principal,—and B, after being properly served with summons, goes into court and confesses judgment for the whole amount claimed, or *consents* to a judgment on the note and a decree of foreclosure on the mortgage, or fails to plead, and judgment is rendered for want of plea, execution is issued, and the property is sold: is A entitled to commence another action on the same note and mortgage for any deficiency, alleging the same breaches, and recover the same amount, simply for the reason that the former judgment and decree was not rendered after a contest, and the amount found to be due was not found by a jury?—can a cause of action, after being merged in a judgment, be again sued upon and merged into as many judgments as a plaintiff chooses to ask for, simply on the ground that the defendant, by consenting to judgment, does not give a court or jury an opportunity to decide and adjudge what he confesses and consents may be decided and adjudged against him? When an action is commenced by filing a complaint and the issue of a summons and a service upon the defendant, every step thereafter taken in the cause is judicial. The suit cannot be dismissed or disposed of without a judgment of some kind. It may be dismissed without *prejudice*, but this is a judgment rendered by the court. So is a judgment confessed or rendered by consent. It is the act of the court, just as much as if it was rendered after a hotly contested trial or upon the verdict of a jury; that litigation is ended for all time, whether ended by consent or by contest. It is not the judgment that creates the estoppel; it is not the *recovery* that creates the *res adjudicata*, but the *matter alleged* by the party on which the *recovery proceeds*, that creates the estoppel. No matter whether the recovery is by consent, default, confession, or after a contest

<sup>1</sup> Wadhams v. Gay, 73 Ill. 415.

before a court and jury, or, if upon demurrer, a judgment is rendered by the court upon a cause of action, *the matter alleged*, that judgment is a judicial act on the merits between competent parties, and merges that cause of action. It ends litigation as to the matter alleged, and is a bar, *a thing adjudicated*, an estoppel to all future litigation on the same matter or cause of action alleged by the plaintiff and admitted by the defendant. If a judgment by consent can be distinguished from one after a trial; if a court can say it is not final and conclusive because it was consented to, there is certainly no reason why a court cannot say that a judgment of affirmance by the Supreme Court of the United States, rendered by consent of parties, is not *res judicata*, but that the parties can relitigate the same question as often as the plaintiff sees fit and the defendant consents. If this is the rule, how often shall a man be vexed for the same cause, and when will there be an end to litigation?

§ 52. When judgment is taken by default, the adjudication will be conclusive of the existence and validity of the right or demand for which the suit is brought.<sup>1</sup>

A judgment by default regularly entered is as binding as any other, so far as respects the power and jurisdiction of the court in declaring that the plaintiff is entitled to recover, though in some cases the amount to be recovered must be afterwards ascertained by a jury.<sup>2</sup> Such a judgment in an action to recover a payment of interest due on a promissory note, where process was personally served and the defendant appeared, but did not

<sup>1</sup> Fagg v. Clements, 16 Cal. 339; Mailhouse v. Inloes, 18 Md. 328; Green v. Hamilton, 16 Md. 317; Minor v. Walter, 17 Mass. 237; Brumagin v. Ambrose, 48 Cal. 366; Whitaker v. Bramson, 3 Paine C. C. 209; Long v. Wortham, 4 Tex. 381; Sturtevant v. Milwaukee, &c. R. R., 11 Wis. 63; Doyle v. Hallam, 21 Minn. 515; Newton v. Hook, 68 N. Y. 676; Gatling v. House, 66 N. C. 374; Loney v. Bailey, 43 Md. 10; Rock v. Leighton, 1 Salk. 310; Yonkers, &c., Co., v. Bishop, 1 Daly, 449; Kelsey v. Ward, 16 Abb. P. 98; Powers v. Witty, 49 Barb. 166; White v. Coatsworth, 6 N. Y. 137; Supervisors v. Briggs, 2 Denio, 26; Demarest v. Darg, 32 N. Y. 281; Dunn v. Pipes, 20 La. Ann. 276; Brown v. Mayor, 66 N. Y. 385; Derby v. Jacques, 1 Cliff. 425; Gates v. Preston, 41 N. Y. 113; Newton v. Houck, 48 N. Y. 176; Sternet v. Kastor, 37 Ala. 366; Ellis v. Miller, 28 Tex. 584; Fletcher v. Holmes, 25 Ind. 458; Grace v. Martin, 47 Ala. 135; Wolf v. Van Metre, 24 Ia. 341; Guthrie v. Howard, 32 Iowa, 54.

<sup>2</sup> Mailhouse v. Inloes, 18 Md. 328

answer, is conclusive against a defense of usury interposed in an action between the same parties, brought to recover the principal of such note.<sup>1</sup> Those facts only which are set forth in the petition are taken to be proved or confessed, and a judgment by default is as conclusive against a married woman as if she were unmarried.

But this conclusive effect must be limited to the matters averred or set forth in the complaint or petition and nothing more. Thus, where A brought an action for partition: A claimed title to an undivided third of certain real estate, as widow of a former husband, R, who died in 1864. A and three children survived R. A mortgage had been foreclosed against the real estate in suit in 1866, A having been made a party to the foreclosure suit and been defaulted. She showed in her complaint that she had never joined in the mortgage. The property was purchased by the appellant, U, at sheriff's sale under the decree of foreclosure. A had judgment, in her favor in the court below. On appeal from that judgment, the court, in affirming the judgment of the court below, said: "Was A estopped by the judgment of foreclosure, to which she was a defendant, from setting up her claim as the widow of R to the land in controversy? It was not alleged in the foreclosure proceedings that she had joined in the execution of the mortgage, nor that the mortgage was given to secure the purchase money of the mortgaged lands; nor was any other fact stated tending to negative her claim to such land as widow of the deceased mortgagor. It was not even averred or shown in that complaint that she was the widow of such mortgagor, the only allegation being that she and her children were heirs, etc. A widow is an heir of her deceased husband only in a special and limited sense, and not in the general sense in which that term is usually used and understood. When A made default in the action of foreclosure nothing was taken against her as confessed, nor could have been, which was not alleged in the complaint; and as nothing was alleged hostile to her claim as widow, it follows that nothing concerning her claim as such widow was concluded against her by the judgment of foreclosure.

<sup>1</sup> Newton v. Hook, 48 N. Y. 676.

A judgment by default is conclusive of all that is properly alleged in the complaint, and nothing more.<sup>1</sup>

Such judgment can not be collaterally impeached. Thus a defendant upon whom process has been properly served and who has been defaulted and arrested on a writ of habeas corpus that he allowed to show at the hearing on a writ of habeas corpus that he is not the true defendant, whose name he bears. Thus the petitioner was served with notice to appear and defend the action in the Superior Court, founded on a replevin bond. The allegation in the declaration was that the defendants executed and delivered the bond, and that there had been breach of the condition. If the petitioner had seen fit to do so, he could have appeared in that suit, denied the allegations in the declaration, and tried the issue whether he executed the bond or not, as well as the question of the breach of the condition. He elected not to do so, and made default. This was an admission of the truth of the matters set up in the declaration of so deliberate and solemn a character that he cannot be heard in denial of it so long as the judgment rendered in that suit remains unreversed. This is so familiar law that it is unnecessary to cite cases in support of the position. It follows that, when suit was brought on that judgment, he was not permitted to impeach it by showing that he did not in fact execute the bond. His arrest on the execution issued on the second judgment was merely a proceeding in the exercise of the rights of the creditor, to enforce collection of the judgment debt, and it is not competent for the petitioner to impeach collaterally a judgment by evidence which it was incompetent for him to introduce at the trial of the suit in which the judgment was rendered. There was no mistake on his part, no fraud upon him, no false testimony used to obtain the original judgment; and even if it was otherwise, the original was valid against him till reversed; and no defense would be open to him founded on facts which existed before it was rendered, nor could such facts avail him in equity more than at law.<sup>2</sup> It is only when the prisoner has been placed in custody as the result of proceedings before a tribunal which had no jurisdiction, so that

<sup>1</sup> *Amfried v. Heberer*, 63 Ind. 67.

<sup>2</sup> *Sheldon v. Kendall*, 7 Cush 217;

*Bost. & Wor. R. R. Co. v. Sparhawk*.

1 Allen, 448; *O'Shaughnessy v. Baxter*, 131 Mass. 515.

its judgment is void, that he is entitled to his discharge on *habeas corpus*.<sup>1</sup>

§ 53. No irregularity in the confession of a judgment can be taken advantage of in a collateral proceeding. It is as conclusive as though rendered after litigation upon a verdict,<sup>2</sup> and is a bar to a writ of error.<sup>3</sup> If a party confesses judgment against himself in a particular character he is estopped from subsequently denying that character;<sup>4</sup> if he omits to plead or give in evidence payments, or fails to set up any defense, such as usury, which existed prior to such confession, he is concluded by such judgment: it is *res judicata*.<sup>5</sup> Usurious interest, included in the amount of a judgment confessed, cannot be recovered back after the judgment has been paid by the defendant in full. Thus, where W. borrowed a sum of money from H., and gave H. a judgment note for the amount of the loan and usurious interest on it, and judgment was entered on the note, which was afterwards paid by W. in full: in an action by W. to recover back the usurious interest he was not allowed to, for the reason that the matter was *res judicata*. But the debtor is not concluded from suing on a counter claim. He is not bound to present it as a set-off in the first suit. If the plaintiff gives a credit in his statement, and upon such statement the confession is made, and subsequently the defendant sues the plaintiff for a cause identical in name with the credit allowed in the first suit, the burden is on him to show that it was not included in the first action.<sup>6</sup> Where one of several defendants confesses judgment which is accepted by the plaintiff, it is a bar

<sup>1</sup> Gorman *in re*, 124 Mass. 190.

<sup>2</sup> Twogood v. Elliott, 22 Iowa, 543; Hopkins v. Howard, 12 Tex. 7; Goodwin v. Mix, 38 Ill. 115; Clive v. Crump, 11 Ind. 125; Jackson v. Tift, 15 Ga. 557; Plummer v. Douglas, 14 Iowa, 69; Sheldon v. Stryker, 34 Barb. 116; Shufeldt v. Shufeldt, 9 Paige, 13; Jeffries v. Morgan, 1 Ark. 160; Gifford v. Thorn, 9 N. J. Eq. 702; Dean v. Thacher, 32 N. J. L. 470; Burchett v. Cassady, 18 Iowa, 342; Bryan v. Miller, 28 Mo. 32; Dunham v. Waterman, 3 Duer, 166; Blystone

v. Blystone, 51 Pa. 373; Hall v. Jones, 32 Ill. 38.

<sup>3</sup> Triplett v. Waring, 5 Dana, 443; Gable v. Williams, 59 Md. 56; U. S. v. Babbitt, 104 U. S. 767; Cunningham v. Schley, 68 Ga. 105.

<sup>4</sup> Thornton v. Lane, 11 Ga. 459.

<sup>5</sup> Swenson v. Cicsoy, 28 Ohio S. 668; Moore v. Barclay, 23 Ala. 740; Town v. Smith, 14 Mich. 348; Miller v. Clarke, 37 Iowa, 325; Troxel v. Clarke, 9 Iowa, 201; Hopkins v. West, 83 Pa. 109; Twogood v. Elliott, 22 Iowa, 543.

<sup>6</sup> Kauff v. Messner, 4 Brews. 93

against the others in that action or another, whether the evidence be of a joint or a joint and several debt.<sup>1</sup> In an action *ex contractu*, if two are sued, and one confesses judgment for both, the authority to do so need not appear of record.<sup>2</sup> But a confession of judgment entered without the knowledge or consent of the judgment creditor, is invalid for all purposes, either as a lien, an estoppel, or a merger of the demand, unless ratified by such creditor. But if he subsequently accepts and ratifies it, it then becomes valid and attended with all the results incident to other judgments.<sup>3</sup> If a creditor of the estate of a deceased person accept a confession of judgment from the administrator at a time when the administrator had funds in his hands he estops himself from averring that he had funds at the time of the confession.<sup>4</sup> A *retraxit* is the open, public and voluntary renunciation by the plaintiff in open court of his suit or cause of action, and if this is done by the plaintiff and a judgment entered thereon by the defendant, the plaintiff's right of action is forever gone.<sup>5</sup>

§ 54. A judgment by default is conclusive, not only as to the actual matter decided, but as to the facts necessary to form the grounds of the decision, provided from the judgment itself the actual grounds can be discovered. By not traversing an allegation in the declaration or complaint a plea admits no more than the plaintiff is bound to prove.<sup>6</sup> Upon the same principle, a judgment by default in a former action estops the party who suffered the judgment to pass against him from setting up any matter in a subsequent action which is inconsistent with any traversable allegation in the former action necessary to support the judgment; but it does not estop him as to any matter which is not inconsistent with such allegations, although it might have been pleaded as a good defense to the former action.<sup>7</sup> "It is

<sup>1</sup> Belzhocver v. Commonwealth, 1 Watts, 126.

<sup>2</sup> Jackson v. Tift, 15 Ga. 357.

<sup>3</sup> Wilcoxson v. Burton, 27 Cal. 228; Haggerty v. Juday, 6 C. L. J. 58; Barefield v. Bryan, 8 Ga. 463.

<sup>4</sup> Dupuy v. Southgates, 11 Leigh, 92.

<sup>5</sup> Cunningham v. Schley, 68 Ga. 105.

<sup>6</sup> King v. Walker, 2 H. & C. 384; Carter v. James, 13 M. & W. 137; Boileau v. Rutlin, 2 Exchq. 697; King v. Norman, 4 C. B. 884; Hyde v. Watts, 12 M. & W. 254; Fanning v. Henderson, 7 Q. B. 811.

<sup>7</sup> Howlett v. Tarte, 10 C. B. N. S. 813; 31 L. J. C. P. 146; Allison's case, L. R. 9 Ch. 25; S. C., 43 L. J. C. 11.

clear upon the authorities and upon principle that if the defendant attempted to put upon record a plea which was inconsistent with any traversable allegation in the former declaration there would be an estoppel;" but the doctrine does not extend to a defense which he could have pleaded in confession and avoidance. Thus the recovery of a judgment by default by the vendor against the vendee on part of several notes for the purchase of property, is not an adjudication upon the issue of warranty and breach, as the vendee may plead it in that action or bring a cross action.<sup>1</sup>

§ 55. Where a court has jurisdiction of the parties, and a judgment is entered by consent of parties, the parties, and those claiming under them, are estopped from denying that they consented in the absence of an allegation of fraud.<sup>2</sup> So a judgment agreed to by the attorney cannot, in the absence of fraud, be impeached by a mere allegation of want of authority in the attorney, his client being estopped, by the judgment of the court, from denying his authority.<sup>3</sup> A consent judgment is a waiver of all prior errors.<sup>4</sup> Such judgment does not affect the rights of persons who are not made parties to the suit but should have been.<sup>5</sup> An acceptance of an offer of judgment merges all claims which might have been litigated.<sup>6</sup>

<sup>1</sup> Thoreson v. Harvester Works, 29 Minn. 341; Davis v. Hedges, L. R. 6 Q. B. 687; Bodurtha v. Phelan, 13 Gray, 413; McKnight v. Devlin, 52 N. Y. 399; Barber v. Cleaveland, 19 Mich. 230.

<sup>2</sup> Cannon v. Hemphill, 7 Tex. 184; Hillsborough v. Nichols, 46 N. H. 379; Dunn v. Pipes, 20 La. Ann. 276; Richmond, &c. Co., v. Shippen, 2 P. H. 327; Fletcher v. Holmes, 25 Ind. 458; Allanson v. Stark, 9 A. & E. 255; Hopetown v. Ramsay, 1 Bell App. C. 69; Chamberlain v. Preble, 11 Allan, 370; Bank v. Hopkins, 2 Dana, 395; Brown v. Mayor, 66 N. Y. 384; Derby v. Jacques, 1 Cliff. 425; Jones v. Webb, 8 S. C. 202; Manion v. Fahey, 11 W. Va. 483;

Greenwood v. New Orleans, 12 La. Ann. 426; Jarboe v. Smith, 10 B. Mon. 257; Brown v. Sprague, 5 Denio, 545; Blanchard v. Pompelly, Hill & D. 198.

<sup>3</sup> Cannon v. Hemphill, 7 Tex. 184; Cayce v. Powell, 20 Tex. 767; Baxter v. Dear, 24 Tex. 17; Dunman v. Hartwell, 7 Tex. 495; Saleski v. Boyd, 32 Ark. 74; McBride v. Bryan, 67 Ga. 584.

<sup>4</sup> Collins v. Rose, 59 Ind. 33; U. S. v. Babbitt, 104 U. S. 767; Gable v. Williams, 59 Md. 56; Cunningham v. Schley, 68 Ga. 105.

<sup>5</sup> Dibrell v. Carlisle, 51 Miss. 785.

<sup>6</sup> Davies v. Mayor, 93 N. Y. 250; Robinson v. Marks, 19 Hun, 325.

§ 56. All courts, whether they exercise civil or criminal jurisdiction, possess the power to vacate their judgments during the term in which they were rendered. Coke states the rule at common law to be that the record of any judicial act done remaineth during the term in the breast of the judges of the court and in their remembrance, hence, as he says, the roll is alterable during that term as the judges shall direct, but when that term is past, then the record, as he states the rule, is in the roll and admitteth of no alteration, averment, or proof to the contrary. Power of a court over its judgments during the entire term in which they are rendered is unlimited. Every term continues until the call of the next succeeding term, unless previously adjourned *sine die*; and until that time the judgment may be modified or stricken out.<sup>1</sup> After the adjournment of the term (unless otherwise provided by statute) the judgment is final, and the court rendering it loses all power and control over the subject matter.

§ 57. There is a vast difference in the effect of a judgment or decree that is void and one that is merely voidable—a judgment is void when it is not according to the regular mode of procedure, *sententia injusta*; it is voidable when the court has made an erroneous decision, *sententia iniqua*. Void judgments are never binding, but judgments voidable merely are binding until reversed by some direct proceeding. Nor can they be collaterally impeached if rendered by courts of general jurisdiction unless void on their face.<sup>2</sup> A judgment which is void and contrary to law, rendered without observing the forms of procedure—as a judgment *in personam*, against a non-resident not served with process, cannot have the effect of *res judicata*. Thus a judgment by default against one not a resi-

<sup>1</sup> Blackmore's Case, 8 Co. 460; Rex v. Fletcher, R. & R. C. C. 60; King v. Justices, 1 M. & S. 442; George v. Wisdom, 2 Burr. 756; Rex v. Knowles, 1 Salk. 47; Turner v. Barnaby, 2 Salk. 566; Greenwood v. Pigott, 3 Salk. 31; Miller v. Finkle, 1 Park. C. C. 376; Rex v. Walcott, 4 Mod. 396; Bassett v. U. S., 9 Wall. 41; Noonan v. Bradley, 12 Wall. 129;

Doss v. Tyack, 14 How. 312; Ashley v. Hyde, 5 Ark. 100; Underwood v. Sledge, 27 Ark. 295; Cook v. Wood, 24 Ill. 296; Taylor v. Lusk, 9 Iowa, 445; State v. Treasurer, 43 Mo. 228.

<sup>2</sup> Reed v. Wright, 2 Greene (Ia.) 15; Hammond v. Wildry, 25 Vt. 342; Mayor v. Ah Loy, 32 Cal. 477; Childes v. Shannon, 16 Mo. 331; Choateau v. Nuckolls, 20 Mo. 442.

dent of the state and without notice, is a nullity.<sup>1</sup> A judgment rendered by a justice of the peace on a summons returnable at an earlier day than the law permits, is a nullity.<sup>2</sup> So a judgment improperly entered by the clerk without the direction or authority of the court, was held void, on the ground that the clerk is a ministerial officer. The distinction between a judgment thus entered and one rendered by the court, is thus stated: "If a judgment be pronounced by a court having jurisdiction, no matter how irregular it may be, it must stand until set aside or reversed on appeal; but when entered by a ministerial officer, without authority of law, it is wholly void."<sup>3</sup> So where a statute confers jurisdiction upon certain courts to grant letters of administration upon the estates of dead persons, a grant of administration upon the estate of a living person is absolutely void, it is a nullity.<sup>4</sup>

§ 57 a. In all judicial or *quasi* judicial proceedings, affecting the rights of the citizen, it is a fundamental rule that he shall have notice, and an opportunity to be heard, before the rendition of any judgment, order, or decree against him.<sup>5</sup> Natural justice requires that no man shall be condemned in

<sup>1</sup> Rider v. Alexander, 1 Chip. 275; Harrod v. Barritto, 1 Hall, 155; Smith v. Rhoades, 1 Conn. 168; Bigger v. Hutchings, 2 Stew. 445; Woodward v. Tremere, 6 Pick. 354; Wheeler v. Raymond, 8 Cow. 311; Wilson v. Niles, 2 Hall, 358; Miller v. Miller, 1 Bailey, 242; Williams v. Preston, 3 J. J. Marsh. 600; Overstrue v. Shannon, 1 Mo. 529; Sallee v. Hays, 3 Mo. 116; Rangle v. Webster, 11 N. H. 299; Bicknell v. Field, 8 Paige, 440; Wood v. Watkinson, 17 Conn. 500; Davidson v. Sharpe, 6 Ired. 14; Warren Co. v. Aetna Ins. Co., 2 Paine C. C. 501; McLawrine v. Monroe, 30 Mo. 400; Pennoyer v. Neff, 95 U. S. 714; Settlemeir v. Sullivan, 97 U. S. 444.

<sup>2</sup> Sanders v. Rains, 10 Mo. 770; Williams v. Bower, 26 Mo. 601; Howard v. Clark, 43 Mo. 344; see Pierce v.

Bowers, 8 Baxter, 353, void for relationship.

<sup>3</sup> Stearns v. Aquire, 7 Cal. 443; Kelly v. Van Austin, 17 Cal. 564; Wilson v. Cleveland, 30 Cal. 192; Glidden v. Packard, 28 Cal. 649.

<sup>4</sup> Jochumsen v. Suffolk Bank, 3 Allen, 87; Allen v. Dundas, 3 T. R. 125; Melia v. Simons, 45 Wis. 334; S. C., 30 Am. R. 716; Roderigas v. East River Bank, 76 N. Y. 316; D'Arusement v. Jones, 4 Lea, 251; S. C., 40 Am. R. 12; Stevenson v. Sup. Ct., 62 Cal. 60; Binson v. Ivey, 1 Yerg. 306; Thomas v. People, 107 Ill. 517; S. C., 47 Am. R. 458; Devlin v. Commonwealth, 101 Pa. St. 273; S. C., 47 Am. R. 710.

<sup>5</sup> Cahoon v. Coe, 57 N. H. 556; Mathews v. Springer, 2 Abb. U. S. 282; Howell v. Gordon, 40 Ga. 302; Chew v. Brumagim, 21 N. J. Eq. 520.

judgment without notice, that is, until he had an opportunity of being heard.<sup>1</sup> The right to be heard and to defend life, liberty, property and reputation, is a natural inherent right of universal obligation; it is an inherent, indefeasable, constitutional right, a common-law right, commencing with the earliest history, and never dispensed with in any government. Where these rights are recognized and protected, before a judicial tribunal can render any judgment whatever, binding on either, it is indispensably necessary that the court, either by its process or by voluntary appearance, should first have acquired jurisdiction of the person of the defendant, as well as of the subject matter. And a judgment rendered by any court without a concurrence of these, is absolutely void.

§ 58. A judgment may be void when it is pronounced by a tribunal having no authority to determine the matter in issue, and such a judgment may be impeached in any proceeding, collateral or other, where it is drawn in question;<sup>2</sup> so a judgment against one not a party to the proceeding or whose name does not appear in any part of the record is void. A judgment is void when it is uncertain,<sup>3</sup> *sententia debet essa certa*, as where a judgment is rendered in the following terms: The plaintiff shall have and recover of the defendant what he owes him. Such a judgment must be void for uncertainty, for what is due the plaintiff not being specified either in the judgment or any thing to which it refers. "*Hæc sententia omnem debit quantitatum cum usuris competentibus solve judicata actionem præstare non potest, cum apud iudices ita dñum sine certa quantitate factu*

<sup>1</sup> King v. Pecham, Carth. 406; Rex v. Clegg, 1 Str. 475; Rex v. Chancellor, 1 Str. 557; Bloom v. Burdick, 1 Hill, 139; Bustard v. Gates, 4 Dana, 435; Mary, The, 9 Cranch, 126; Boswell v. Otis, 9 How. 350; Borden v. Fitch, 15 Johns 142; Hilboun v. Woodworth, 5 Johns. 41; Robertson v. Ward, 8 Johns. 80; Fenton v. Garlick, 8 Johns. 96; Pawling v. Bird, 13 Johns. 192; Gwin v. Carroll, 9 Miss. 368; Steers v. Steers, 25 Miss. 513; Edwards v. Toomer, 22 Miss. 75; Smith v. State,

22 Miss. 140; Harris v. Haldeman, 14 How. 336; Mason v. Killiburn, 2 Yerg. 383; Shafer v. Gates, 2 B. Mon. 455; Gwin v. McCarroll, 9 Miss. 368; Borden v. State, 11 Ark. 529.

<sup>2</sup> Eaton v. Badger, 33 N. H. 228; Meise v. Presby, 25 N. H. 299; Gilliland v. Seller, 2 Ohio S. 223; People v. Reynolds, 28 Cal 108; People v. Flint, 39 Cal 670; People v. Goldtree, 44 Cal. 323; Pierce v. Bowers, 8 Baxter, 353.

<sup>3</sup> Mosley v. Cooke, 7 Leigh, 225; Ford v. Doyle, 27 Cal. 346.

*condemnatio auctoritate rei judicatus censetur, si parte aliquâ actorum certa sit quantitas comprehensa."*

So where upon the hearing of a case of contempt, the relator is adjudged to be in contempt, and is ordered to stand committed until further order of the court, and the commitment is so issued the judgment is so uncertain in its duration as to be void.<sup>1</sup> So a sentence in a criminal case which is unauthorized by statute is an entirety; if it exceeds the punishment provided by law it is wholly illegal and void.<sup>2</sup> So a judgment rendered against an officer of the army while in service during war, insurrection, etc., in the enemy's country, as such officer is not liable to a civil action in the courts of that country for injuries resulting from acts of war ordered by him in his military character; nor can he be called upon to justify or explain his military conduct in a civil tribunal upon any allegation of the injured party that the acts complained of were not justified by the necessities of war. He is responsible only to his own government, and only by its laws, administered by its authority, can he be called to account.

"When any portion of the enemy's country was in the military occupation of the United States during the late war, the municipal laws were generally continued in force and administered through the ordinary tribunals for the protection and benefit of the inhabitants and others not in the military service, but not for the protection or control of the army or its officers or soldiers. Accordingly, when a brigadier-general in the army of the United States, during the war, in command of troops in Louisiana, was sued in a District Court of that State—continued in existence after the military occupation of the country by the United States, and authorized by the commanding general to hear causes between parties—for ordering a military company to seize and carry off as supplies for the army certain personal property of the

<sup>1</sup> *People v. Perpenbrick*, 12 C. L. N. 34.

<sup>2</sup> *Rex v. Ellis*, 5 B. & C. 395; *Rex v. Bowne*, 7 A. & E. 58; *Queen v. Silversides*, 3 Q. B. 406; *King v. Queen*, 7 Q. B. 795; *Holt v. Reg.*, 2 D. & L. 774; *Page, in re*, 49 Mo. 291; *Hol-*

*land v. Queen*, 2 J. & S. 337; *O'Leary v. People*, 4 Park. C. R. 187; *Shepherd v. Commonwealth*, 2 Met. 419; *Stevens v. Commonwealth*, 4 Met. 360; *Fitzgerald v. State*, 4 Wis. 395; *Fellinger v. People*, 15 Abb. Pr. 128; *Ratzky v. People*, 29 N. Y. 124; *Lange in re*, 18 Wall.

plaintiff, which seizure was alleged by him to have been unauthorized by the necessities of war, or martial law, or by the superiors of the brigadier-general, and judgment by default was rendered against the brigadier general for the value of the property, it was held, in a suit brought in the Circuit Court of the United States, upon the judgment thus rendered, that the State court had no jurisdiction of the alleged cause of action, and that its judgment was void."

"This doctrine of non-liability to the tribunals of the invaded country for acts of warfare is as applicable to members of the Confederate army, when in Pennsylvania, as to members of the National army when in the insurgent States. The officers or soldiers of neither army could be called to account civilly or criminally, in those tribunals for such acts, whether those acts resulted in the destruction of property or the destruction of life; nor could they be required by those tribunals to explain or justify their conduct upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war."

§ 59. A citation is a matter of pure natural right introduced *ab origine mundi*, for God cited our first parent, saying, Adam, Adam, where art thou? "To bind a defendant personally when he was never personally summoned, or had notice of the proceeding, would be contrary to the first principles of justice. A personal judgment thus recovered has no binding force without the state in which it is rendered, implying that in such state it may be valid and binding. But if the court has no jurisdiction over the person of the defendant by reason of his non-residence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding without service upon him or his appearance is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice, it is difficult to see how the judgment can legitimately have any force within the State. The language used can be justified only on the

<sup>1</sup> People v. Coleman, 97 U. S. 509; 92 U. S. 197; Coolidge v. Guthrie, 2 Ford v. Surget, 97 U. S. 605, Le Caux v Am L. R. (N. S.) 22; Dow v. Johnson, Eden, 2 Doug. 594; Lamar v. Browne, 100 U. S. 158.

ground that there was no mode of directly reviewing such judgment or impeaching its validity within the State where rendered, and that, therefore, it could be only called in question when its enforcement was elsewhere attempted. In later cases this language is repeated with less frequency than formerly, it is beginning to be considered, as it always ought to have been, that a judgment which can be treated in any State of this Union as contrary to the first principles of justice and as an absolute nullity because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the State where rendered.”

“The courts of the United States are not required to give effect to judgments of this character when any right is claimed under them. Whilst they are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State courts only the same faith and credit which the courts of another State are bound to give to them.”

“Since the adoption of the 14th amendment to the Federal Constitution the validity of such judgments may be directly questioned and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit, and if that involves merely a determination of the personal

<sup>1</sup> *Smith v. McCutchen*, 38 Mo. 415; *Hakes v. Shupe*, 27 Iowa, 465; *Mit Darrance v. Preston*, 18 Iowa, 397; *chell v. Gray*, 18 Ind. 123.

liability of the defendant, he must be brought within its jurisdiction by service of process within the state or his voluntary appearance."

"Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication allowed by the laws in the several states where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*, for any other purpose than to subject the property of a non-resident to valid claims against him in the state, 'due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.'"<sup>1</sup>

"In a strict sense a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors or instituted to partition real estate, foreclose a mortgage or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem* in the broader sense mentioned."

"In all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the state creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action."<sup>2</sup>

<sup>1</sup> Cooley on Limitations, 405.

<sup>2</sup> Nations v. Johnson, 24 How. 203.

"We do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the state, though made without service of process or personal notice to the non-resident. The jurisdiction which every state possesses to determine the civil status and capacities of all its inhabitants, involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The state, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the state of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress."<sup>1</sup>

"So a State may require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure to make such appointment or to designate such place, that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may be binding upon the non-residents both within and without the State. As was said by the Court of Exchequer,<sup>2</sup> 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings, should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them.'<sup>3</sup> So a State, on creating corporations or

<sup>1</sup> Bishop M. and D. § 156.

290.

<sup>2</sup> Valle v. Dumerque, 4 Exchequer,

<sup>3</sup> Lafayette Insurance Company v

other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law."<sup>1</sup>

§ 60. The distinction between a nullity and an irregularity may be thus stated. No order which a court empowered, under any circumstances in the course of a proceeding over which it has jurisdiction, to make, can be treated as a nullity merely because it was made improvidently, or in a manner not warranted by law or the previous state of the case. The only question in such a case is: Had the court or tribunal the power, under *any circumstances*, to make the order or perform the act? If this is answered in the affirmative, then its decision upon *those* circumstances becomes final and conclusive until reversed by a direct proceeding for that purpose. It is for the court to determine when and how the authority with which it is invested shall be exercised. If in so doing it commits an error, no matter how egregious, whether in the construction of a law or otherwise, its decision is valid until reversed on appeal. It is a mere error or irregularity, which can only be taken advantage of by a direct proceeding in an appellate tribunal, and cannot be inquired into in a collateral proceeding. Its judgment stands good till reversed or annulled by a proper course of proceedings for that purpose,<sup>2</sup>

French, 18 How. 407; Gillespie v. Commercial Insurance Company, 12 Gray, 201.

<sup>1</sup> Cupin v. Adamson, L. R. 9 Ex. 345; Pennoyer v. Neff, 95 U. S. 714. Per Field, J.

<sup>2</sup> Herrick v. Smith, 1 Gray, 49; Alderson v. Bell, 9 Cal. 315; Adams v. Vose, 1 Gray, 51; Briggs v. Bowen, 60 N. Y. 454; Butcher v. Bank, 2 Kas. 70; Bush v. Lindsay, 24 Ga. 245; Bushee v. Searles, 77 N. C. 62; Buell v. Trustees, 11 Barb. 603; Boyd v. Gentry, 12 Heisk. 625; Barney v. Patterson, 6 H. & J. 183; Bayl v.

Lapham, 27 Ohio S. 453; Butterfield's Appeal, 77 Pa. 197; Bragg v. Lowe, 1 Woods, 209; Calkins v. Parke, 21 Barb. 275; Cox v. Thomas, 9 Gratt. 323; Chestine v. McCoy, 7 Jones L. 376; Concoran v. Chesapeake, &c. Co., 94 U. S. 741; City, &c. v. Taylor, 11 B. Mon. 361; Dickerson v. Powell, 21 Ga. 143; Dayton v. Mintzer, 22 Minn. 393; Evans v. Ashley, 22 Ind. 115; Farmers' Ins. Co. v. Highsmith, 44 Iowa, 330; Gunn v. Plant, 94 U. S. 664; Goar v. Miranda, 57 Ind. 339; Grignon v. Astor, 2 How. 319; Holmes v. Camp-

and is *res judicata*. Thus in a case where the summons is properly served and the court obtains jurisdiction of the persona of the defendant, the subject matter of the action being also within its jurisdiction—having jurisdiction of the parties and of the subject matter, the court must have jurisdiction to render a judgment in that action. In a late case in the Supreme Court of the United States, where the validity of a judgment was questioned, that court said :

“The summons in this case gave full and particular notice to the defendant of the cause of action. It was served, as clearly appears from the return, in the county where the suit was brought. It was served on the person appointed to receive service of process for the company. It is not pretended that it was not served in the county where the company had its principal office, or where its principal business was carried on, or that he was not the right person on whom service should have been made. The service was regular and effectual.”

“The court, therefore, had jurisdiction of the parties. It had jurisdiction of the subject-matter, and the judgment which it rendered was within the jurisdiction conferred on it by law. The judgment which it rendered recited that he was the general agent of the company, and as such consented that judgment might be entered against the defendant. The law, therefore, when the judgment is questioned, presumes that the court was satisfied by proof that the agent had authority to give the consent of the company to the rendition of the judgment. The fact that he was such general agent, and authorized to consent to the entry of judgment, is not denied in the bill, nor is there any proof in the record to show that he was not the agent of the company,

bell, 12 Minn. 221; Hubbard v. Fisher, 25 Vt. 530; Mayo v. Polley, 40 Cal. 281; Moore v. Ware, 51 Miss. 206; Lancaster v. Wilson, 27 Chitt. 624; Owens v. Gotzian, 4 Dill. 436; Otis v. Rio Grande, 1 Woods, 279; People v. McGowan, 77 Ill. 644; Prince v. Griffin, 16 Iowa, 552; Reynolds v. Stansbury, 20 Ohio, 344; Rollins v. Henry, 78 N. C. 342; Smith v. Ramsey, 27 Ohio S. 339; Sidens

parker v. Sidensparker, 52 Me. 481; Spaulding v. Baldwin, 31 Ind. 376; Tadlock v. Eckles, 20 Tex. 782; Taylor v. Phelps, 1 H. & J. 492; Van Valkenburgh v. Milwaukee, 43 Wis. 374; Willis v. Ferguson, 46 Tex. 496; Withers v. Patterson, 27 Tex. 491; Talman v. McCarty, 11 Wis. 401; Payne v. Moreland, 15 Ohio, 436; Voorhees v. Bank, 10 Pet. 449; Davenport v. Barnett, 51 Ind. 329.

fully authorized to consent to the rendition of the judgment."

"But if he was not such agent, the question arises whether the rendition of the judgment before the time for filing defendant's answer had expired renders the judgment void. We are of opinion that it does not; that its rendition was simply erroneous and nothing more. The court having jurisdiction to render the judgment, and having rendered it, the law, when the judgment is collaterally attacked, will make all presumptions necessary to sustain it.<sup>1</sup> The defendant, being in court, was bound to take notice of its proceedings, and might have corrected the error at any time during the term. It did not move to set the judgment aside. It filed no answer. The presumption, therefore, which the law makes, is either that it consented to a submission of the case before the time for answer expired, or that it subsequently waived the error by not seeking to correct it."

"It is of no avail to show that there are errors in the record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power.<sup>2</sup> This principle has been often held by this court and by all courts, and it takes rank as an axiom of law. The settled rule of law is, that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud."<sup>3</sup>

"The judgment, therefore, cannot be declared void. It could not be successfully attacked in this collateral way even by the defendant, much less by one not a party to it. We must assume the judgment to be valid and binding until reversed in a direct proceeding."<sup>4</sup>

§ 61. It is not absolutely necessary that the object of the adjudication should be expressed by the judgment; it is sufficient

<sup>1</sup> Grignon v. Astor, 2 How. 319.

<sup>2</sup> Cooper v. Reynolds, 10 Wall. 308; Cornett v. Williams, 20 Wall. 226.

<sup>3</sup> Kempe v. Kennedy, 5 Cranch, 173; Thompson v. Talmie, 2 Pet. 157; Voorhees v. Bank, 10 Pet. 449; Grig-

non v. Astor, 2 How. 319; Florentine v. Barton, 2 Wall. 210; McGoon v. Scales, 9 Wall. 23; Glover v. Holman, 3 Heisk. 519; West v. Williamson, 1 Swan (Tenn.) 277; Cornett v. Williams, 20 Wall. 226.

<sup>4</sup> White v. Crow, 110 U. S. 183.

if it can be ascertained by reference to anything to which the judgment refers. Thus a judgment ordering the defendant to pay what is demanded of him is valid and may be effectual as *res adjudicata*, when the cause of the demand is set forth in the proceedings to which the judgment refers. *Cum iudex iat solve quod petitum est valet sententia.*

Nor is it requisite that the amount of the judgment should be liquidated; it is sufficient if it may become so by reference to a master or referee, etc. Thus a judgment or decree requiring the defendant to pay damages or indemnify the plaintiff is not the less final because it requires some future order of the court to carry it into effect; although the amount of the recovery is uncertain, the nature of the judgment is definite and certain, and the amount of the recovery will become certain by reference. *Quamquam pecuniæ quantitas sententiâ non continetur, sententia tamen rata est quoniam INDEMNITATE reipublice præstari possit.*<sup>1</sup> Thus, if after a judgment or decree has been entered and no further questions can come before the court, except such as are necessary to be determined in carrying the decree into effect, it is final and has the authority of *res judicata*.<sup>2</sup>

A judgment is void when the object of the adjudication is anything impossible. *Paulus respondit, impossibile præceptum iudicis nullius esse momenti. Qui sent. Idem respondit ab ea sententiâ cui parere rei natura non potuit, sine causa appellari.*

A judgment is void when it adjudges anything which is directly contrary to law, *sic expressim sententiâ contra juris rigorem data sit. Si speculiter contra leges vel senatus, consultum vel constitutiones fuerit prolata*; but if it merely adjudges that the law should not be complied with, or the particular question is not provided for by law, it is not void but merely voidable, and can only be avoided by reversal in the ordinary mode. *Quum,*

<sup>1</sup> Neall v. Hill, 16 Cal. 145; Mills v. Hoag, 7 Paige, 18; Johnson v. Everett, 9 Paige, 636; Quackenbush v. Leonard, 10 Paige, 131; Dickinson v. Codwise, 11 Paige, 139; Stoval v. Banks, 10 Wall. 583; Travis v. Walters, 12 Johns. 500; Lewis v. Oultan, 3 B. Mon. 453; Forgay v. Conrad, 6

How. 201; Bronson v. R. R. Co., 2 Black, 531; Ray v. Law, 3 Cranch, 179; Meek v. Mathias, 1 Heisk. 534.

<sup>2</sup> Whiting v. Bank of U. S., 13 Pet. 6; Bronson v. R. R. Co., 2 Black, 524; Ogilvie v. Knox Ins. Co., 2 Black, 539; Ilumeston v. Stampthorp, 2 Wall. 106.

*prolatis constitutionibus, contra eas pronunciat iudex, eo quod non existimat causam de qua iudicavit per eas juvari non videtur contra constitutiones sententiam dedisse ideoque ab ejus modi sententiâ appellandum est, alio quin rei judicatie stuitur.*

A judgment is void when it contains inconsistent and contradictory adjudications. Thus where an action is brought to recover certain property which I have agreed to convey to you, the judgment dismisses the action against me and requires you to pay me the purchase price with interest. I can never enforce the judgment against you, because the dismissal of your action against me is repugnant to the judgment against you, and it is contrary to justice that while I retain the property I should compel you to pay for it.

A judgment is void when it adjudges matters not in issue or condemns a party to a greater amount than that for which the action is brought, for a court can only decide upon the matters in issue before it, and can render judgment only on such issues.

“*Potestas iudicis ultra id quod in iudicium deductum est nequa quam potest excedere.*” So a judgment is void when the court dismisses an action in which the defendant has confessed judgment.

§ 62. A judgment to be valid ought to be rendered between persons capable of being parties in a judicial proceeding. “*Qua habent legitimam standi in iudicio personam.*” All proceedings by or against persons incapable of being such parties, as well as the judgments founded on such proceedings are *ipso jure* void. Thus a judgment against a party who at the time is dead, is void. *Eum qui in rebus humanis non fuit sententia datæ tempore, inefficater condemnatum vi dari.* So of a judgment against a minor or insane person; the action, in which they are interested can only be commenced by their guardians in the capacity of guardians, and against them as guardians, not by or against the minors themselves.

The true distinction between void and voidable acts, orders and judgments is that the former can always be assailed in any proceeding and the latter only in a direct proceeding.<sup>1</sup> While a void judgment is of no effect and may be relieved against with-

<sup>1</sup> *Alexander v. Nelson*, 43 Ala. 462.

out reversal, an erroneous judgment is binding on all parties until reversed.<sup>1</sup> In a one case, the Supreme Court of the United States said: "It is very clear that a decision of a court is not technically a judgment until in some form it has been entered of record. If entered in the course of judicial proceedings, of which the court has jurisdiction, it is binding until reversed or set aside, no matter how irregular it may be as to matters of form. In this case a judgment was entered in due form. As a judgment it was complete. There has been a verdict, and that appeared among the files in the cause. It was within the power of the court, therefore, to enter the judgment. The only defect in the proceedings is an omission to properly record the verdict. That seems to us an irregularity only. The court had jurisdiction of the cause and of the parties, and in due course of proceeding had the power to enter the judgment, and did so. This the record shows. A person interested in the question would, upon application at the clerk's office, have found a judgment recorded in the proper place. In the form it was entered it was a lien upon the lands of the defendant. This was the essential fact. It matters not that the record also disclosed an irregularity, for which, unless it could be cured, the judgment as recorded might, upon proper application, be set aside, for until set aside it continued in force as a subsisting lien.<sup>2</sup> Premature rendition of a judgment, after a regular service of summons and after the time given by law to defendant to plead, is an irregularity.<sup>3</sup> So a judgment signed after the defendant's death, and one entered for too large a sum.<sup>4</sup>

A judgment rendered by a court having jurisdiction over the subject-matter and the person, is unquestionably conclusive and binding on the parties, unless reversed or set aside in some mode or manner prescribed by law. But it is essential to the validity of a judgment *in personam*, that the court should have jurisdic-

<sup>1</sup> Miller v. Barkeloo, 8 Ark. 318; Brown v. Bird, 8 Ark. 324; Young v. Bird, 8 Ark. 324; Webster v. Reid, 11 How. 450; Walden v. Craig, 14 Pet. 154; Cooper v. Reynolds, 10 Wall. 316.

<sup>2</sup> Gunn v. Plant, 94 U. S. 664.

<sup>3</sup> Salter v. Hilgern, 40 Wis. 363; Tallman v. McCarty, 11 Wis. 401; Hyde v. Thurstout, Sayer, 303, Doe v. Hedges, 4 D. & R. 393; Aetna Ins. Co. v. McCormick, 20 Wis. 265.

<sup>4</sup> Harden v. Forsyth, 1 A. & E. N. S. 177; Chapman v. Hicks, 2 Dowl P. C. 641.

tion over the parties, and if reached without such jurisdiction it is a mere nullity. Such a judgment is not merely erroneous because of some irregularity in the mode of proceeding, or error on the part of the court in the application of the law to the particular case, and for which the party aggrieved must seek a remedy by appeal or writ of error, but being a judgment rendered without jurisdiction, it is absolutely void, and may be assailed at all times, and in all proceedings by which it is sought to be enforced.

If the court renders a judgment by default when there is a defense set up, it has the power so to do. Yet a judgment by default founded on such erroneous determination is not a nullity, but only irregular.<sup>1</sup> So, "Signing judgment against one not before the court is an act wholly without warrant or foundation; but if, on a verdict for \$20, I enter up judgment for \$40, here I have taken a step which I was entitled to take, entering a judgment being warranted by the verdict; but having taken it in an improper manner, it is an irregularity."

"A nullity is such a defect as renders the proceedings in which it occurs totally null and void, of no avail or effect whatever, and incapable of being made so;" while an irregularity, as distinguished from a nullity, "consists either in omitting to do something that is necessary to the due and orderly conducting of a suit, or doing it in an unreasonable time or improper manner. It may be defined as a proceeding that is taken without any foundation for it, or that is essentially defective, or that is expressly declared to be a nullity by a statute." It is also said that an irregularity may be waived, while a nullity cannot; but the caution is added that *waiver* in the strict sense of the term is meant, and that the rule must not be carried so far "as to suppose that at *any* period, or under *any* circumstances, this objection must of necessity be available."

Notwithstanding general definitions, the courts have found it difficult to determine in many cases whether errors and omissions in the course of legal proceedings rendered the proceedings void, or were mere irregularities. In doubtful cases, however, as the safer course, the courts incline to treat the defects as irregularities rather than as nullities.

<sup>1</sup> *Salter v. Hilgern*, 40 Wis. 363.

§ 64. There are several elements necessary to a plea of *res judicata*. They may be designated as principal and collateral—the latter being a final judgment, upon the merits, between the same parties, for the same cause of action. The principal element is that it must be a valid judgment. That is, it must be rendered by a court legally constituted, having jurisdiction of the cause and the person. Without jurisdiction there is no validity or vitality to the judgment. Jurisdiction being the principal element upon which the whole doctrine of *res judicata* is based, it becomes important to ascertain what jurisdiction is, how obtained, and its effects when obtained, and when a court proceeds without it. In order to give validity to a judgment of a court there must be jurisdiction of the cause and of the person. Jurisdiction of the cause arises out of some right or claim to a thing within the territorial jurisdiction of the court, or out of some controversy between the parties—involving the claim of one or the other, for the performance of some act, as the payment of money, the transfer of property, or the doing or omission, or forbearance to do some act—which controversy the court is invested with authority to decide. When a court is moved by one party to enforce a claim or decide a controversy, and for that purpose brings before it the other party, this is obtaining jurisdiction of the person. Jurisdiction of the person is properly acquired by personal notice or service of process; but other modes have been substituted by express provisions of law or the practice of courts—as publication, notice to the agent or attorney of the party, or an appearance for him by one of the attorneys of the court. Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*.<sup>1</sup>

<sup>1</sup> *Boswell v. Otis*, 9 How. 348; *Bank v. Peabody*, 55 Vt. 492; *S. C.*, *Durant v. Abendroth*, 97 N. Y. 133; 45 Am. R. 632.

“When process is instituted—when, on a demand for it in the prescribed mode, the process of the court is issued—the steps taken under that process must be matter proper for the consideration of the court. The court must determine whether the suit is prosecuted—whether the demand for the thing to which a right is asserted is continued. So, if it be claimed that process has been waived, the fact of waiver, or the authority to waive, as shown by the evidence, must be decided by the court. This determination or decision may be express on the very point, as by an assertion on the record, that the process has been served, or that the party has appeared by an attorney, or it may be necessarily implied in the action of the court upon the demand of the party. The determination or decision, that a party has been served with process, or that he has given authority to waive process, if in truth he has not been served, or given such authority, is a determination or decision, when he has no opportunity to be heard. Hence, the right to show in opposition to the record of such determination or decision, the truth by evidence has been claimed, as required by the principles of natural justice.

“If the court acts at all upon the question whether a party has been served with process, or has authorized an appearance in the absence of such party, then the decision must be made at the risk of an incorrect conclusion. And it would be absurd to require notice of such inquiry, as that would involve a similar enquiry, whether there were notice of that notice. The court must act upon the demand for which process has been instituted, either with or without inquiry into the fact whether such process has been served. That there should be no inquiry—that a judgment by default should be rendered without inquiry into the fact whether the process has been served on the defendant—cannot with any propriety be claimed. If then, the inquiry should be made, what effect is to be given to the determination or decision? Is it obligatory, unless impeached or set aside in the mode prescribed as to other decisions of the court, or may it be disregarded as null and void, whenever brought in question, upon allegation and proof that the party in truth had no notice or opportunity to be heard? Here arises a conflict between principles of policy, which require the former conclusion, and principles of natural justice, which lead to the latter; and, as might

be expected in cases of such conflict, the decisions of courts have differed.

"As to the judgments of courts of general jurisdiction, the general rule is to sustain such judgments against indirect or collateral attacks on their validity and effect. It appears to have been thought that natural justice is satisfied, when notice is required, and an impartial tribunal established to ascertain and determine whether it has been given. Nor can it be properly said that such a tribunal has jurisdiction, because it has so decided. Its decision is binding, because it was authorized to make it, and because public policy and the respect due to the sovereignty it represents, at least in tribunals acting under the same sovereignty, requires that the decision should be regarded, while it remains on the record unimpeached and unreversed."

§ 65. *Nihil aliud est iurisdicito quam habere auctoritatem iudicandi sine ius dicendi inter partes de actionibus personarum et rerum, secundum quod deductae fuerint in iudicium per auctoritatem ordinariam vel delegatam.* Jurisdiction is given by law, and cannot be conferred by consent of the parties;<sup>1</sup> but a privilege defeating jurisdiction may be waived if the court has jurisdiction over the subject matter. Jurisdiction given by the law of the sovereignty of the tribunal is sufficient everywhere, as to all property within the sovereignty and as to persons of whom process is actually and personally served within the territorial limits of jurisdiction, or who appear and by their pleadings admit jurisdiction. Jurisdiction must either be of the *cause*, which is acquired by exercising powers conferred by law over property within the territorial limits of the sovereignty, or of the person, which is acquired by actual service of process or personal appearance of the defendant. The question as to the possession of the former is to be determined according to law of the sovereignty of the latter, as a simple

<sup>1</sup> Callen v. Ellizon, 13 Ohio S. 446; Voorhees v. Bank, 10 Peters, 449; Watkins *in re*, 3 Pet. 183; Coit v. Haven, 30 Conn. 195; Kip v. Fullerton, 4 Minn. 473; Potter v. Merchants' Bank, 28 N. Y. 654; Sheldon v. Wright, 5 N. Y. 517.

<sup>2</sup> Burekle v. Eckhart, 3 N. Y. 132; Coffin v. Tracy, 3 Caines, 129; Davis v. Packard, 7 Peters, 276; Dudley v. Mayhew, 3 N. Y. 9; McMahon v. Rauh, 47 N. Y. 67; People v. Clerk, 3 Abb. Pr. 309.

question of fact. Thus admiralty proceedings *in rem* are conclusive everywhere if the court had a rightful jurisdiction founded on actual possession of the subject matter, and a personal judgment in an action between citizens of the same sovereignty, when properly authenticated and sought to be enforced in another State, is conclusive in such sovereignty of the rights of the parties.

§ 66. *Jurisdictio est potestas de publico introducta cum necessitate juris dicendi.* Jurisdiction is a term signifying the authority of law over a certain territory or over certain persons; but since the action of the persons must always be the essential object of all laws, the jurisdiction of laws over a certain territory means over all the persons within that territory.<sup>1</sup> The term jurisdiction has two different significations. First, its primary, natural sense—the right to deal with particular things or persons. Second, its far more common acceptation—the territorial limits within which that authority is exercised.

Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is whether, on the case before the court their action is judicial or extra-judicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it.<sup>2</sup> It is the authority to judge or administer justice, the power to act judicially, and to pronounce judgment, introduced by common right, arising out of the necessity of declaring law.

§ 67. Jurisdiction depends upon the fact that either the person or thing is within the territorial limits of the tribunal where the action is brought. “Actions are either local or transitory, the former being founded on such causes of action as necessarily refer to some particular locality, as in the case of trespasses to

<sup>1</sup> Hurd, F. & B. 23.

718; *Schroeder v. Ins. Co.*, 104 Ill.

<sup>2</sup> *Rhode Island v. Mass.*, 12 Pet. 71.

lands; the latter as in such causes of actions as may take place anywhere, as in the case of trespasses to goods, batteries, and the like. Real actions are always in their nature local; personal are for the most part transitory. Between local and transitory actions there are important distinctions—that the former are, as the general rule, tried in the proper county where the cause of action arose, and by a jury of that county; the latter may be tried in any county at the discretion (in general) of the plaintiff.

§ 68. Jurisdiction in personal actions depends upon service or notice to the party in person, or, what is equivalent thereto, at the domicile or residence of the party, which must of necessity be within the territorial limits of the tribunal. Without service the judgment *in personam* of any court is a nullity, except in the States where local statutes may otherwise provide. Beyond those localities it is absolutely void. No judgment *in personam* can have any extra-territorial force unless the parties are subject to the jurisdiction of the court.

Proceedings *in rem* are of a different character; a judgment and sale under such proceedings, when had under a competent tribunal of the place where the property lies, gives a title which cannot be impeached in any country. In this class of actions the defendant is notified upon seizure of his property to attend court and defend the action. Of this character are actions against non-residents by attachment, against non-resident mortgagors, etc. There can be no question as to the power of a State to sell such property on such a judgment. The power of a State over real or personal property within its borders is unquestioned, no matter where the owner may be. “A nation within whose territory any personal property is actually situate has as entire dominion over it, while therein, in point of sovereignty and jurisdiction, as it has over immovable property there situate. It may regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it, to the same extent that it may exert its authority over immovable property.”<sup>1</sup>

If a court has no jurisdiction its decision is a nullity, and it matters not what facts it finds, or what questions it decides—in

<sup>1</sup> Story Conflict of L. § 550; *Castrique v. Imrie*, L. R. 4 H. L. Cas. 428

fact they are all nullities. If without jurisdiction it cannot adjudicate the real merits of the case, it cannot adjudicate any other question, whether it be introductory, incidental, or collateral. A judgment becomes absolute verity, and concludes the parties thereto, because, and only because the court pronouncing it had jurisdiction so to do.

§ 69. Jurisdiction is the right to pronounce judgment acquired through due process of law. Due process of law imports the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.<sup>1</sup> The right of a court to pronounce judgment by *due process of law* demands that there shall be a major portion of the essential requisites, viz.: jurisdiction of the territory, that is, within a township, City, County, District, or State. Jurisdiction of the subject-matter; as, for example, United States courts in admiralty proceedings, ecclesiastical courts of church government, probate courts of the estates of deceased persons, and military courts of persons in military service. Jurisdiction of the process; as where a court of probate appoints an administrator, or has power to enforce its sentence or judgment. Jurisdiction of the person; that is, the person must not only be within the territorial jurisdiction of the court, but he must be personally notified as required by law. Jurisdiction of the action; as where the right to probate a will is conferred on a special tribunal, or actions concerning real estate are vested in courts of general jurisdiction. Jurisdiction is the right to pronounce judgment acquired through due process of law.

§ 70. The constitutional provision (that no person shall be deprived of his property without *due process of law*) is no broader or surer or better understood than the common law principle, or principle of natural justice which lies at the foundation of our jurisprudence, that no man shall have his property taken from

<sup>1</sup> Zeigler v. R. R. Co., 58 Ala. 594.

him by a judicial proceeding without an opportunity being given him to show why it should not be taken—that is, without a day in court. “*Due process of law*,” when applied to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a competent tribunal to pass upon their subject-matter; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or by his voluntary appearance.<sup>1</sup>

§ 71. The forms of a suit or action are not indispensably demanded by the constitutional clause as to due process of law; whenever the laws of a state provide for a mode of ascertaining or contesting a charge or claim in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.<sup>2</sup>

§ 72. The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard, and when the latter is denied the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear, is in legal effect the recall of the citation to him. The period within which the appearance must be made and the right to be heard exercised, is, of course, a matter of regulation, depending either upon positive law, or the rules or orders of the court, or the established practice in such cases. And if the appearance be not made, and the right to be heard be not exercised

<sup>1</sup> Taylor v. Porter, 4 Hill, 146; Burch v. Newburg, 10 N. Y. 397; Embury v. Connor, 3 N. Y. 517; Pennoyer v. Neff, 95 U. S. 714; South v. Commissioners, 7 Neb. 253; Green v. Greggs, 1 Curt. C. C. 326; R. R. Co. v. Baty, 6 Neb. 37; Board v. Heister, 37 N. Y. 682; Murray v. Hoboken, 18 How. 280; Rowan v. State, 30 Wis. 129; McCready v. Sexton, 29 Iowa, 355; Westervelt v. Gregg, 12 N. Y. 209; Wynhamer v. People, 12 N. Y. 416.

<sup>2</sup> Davidson v. New Orleans, 96 U. S. 97.

within the period thus prescribed, the default of the party prosecuted, or possible claimants of the property, may, of course, be entered, and the allegations of the petition be taken as true for the purpose of the proceeding. But the denial of the right to appear and be heard at all, is a different matter altogether.<sup>1</sup>

§ 73. Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding being *coram judice*, can be impeached collaterally only for fraud. In all other respects, it is as conclusive as if it were irreversible in a proceeding for error. This doctrine, that, where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of these judgments.

Though the court may possess jurisdiction of a cause, of the subject matter and of the parties, it is still limited in its modes of procedure and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine is subject to many qualifications.

<sup>1</sup> Brown v. Hummel, 6 Pa. St. 86, McAuley's Appeal, 77 Pa. St. 397.

The judgments mentioned, given in the cases supposed, would not be merely erroneous, they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases.

It by no means follows that because a court has jurisdiction of the parties and the subject matter, that these facts would make valid, however erroneous it may be, any judgment a court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if, on an indictment, for treason the court should render a judgment of attain, whereby the heirs of the criminal could not inherit his property, which should by the judgment of the court be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court, and forbidden by the Constitution. So it was held, "that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder, after the termination of the life estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, the court replied: 'Doubtless, a decree of a court having jurisdiction to make the decree cannot be impeached collaterally; but under the act of Congress, the District Court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction.'" So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is that the courts are not authorized to exert their power in that way. The doctrine is only

<sup>1</sup> *Lange in re*, 18 Wall. 163; *Bigelow v. Forest*, 9 Wall, 351.

correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. It may be more accurately stated that jurisdiction having attached, everything done *within the power of that jurisdiction*, when collaterally questioned; is held conclusive of the rights of the parties unless impeached for fraud.<sup>1</sup> Jurisdiction is the right to hear and determine, not to determine without hearing. This principle was pointedly applied by the Supreme Court of the United States,<sup>2</sup> by Judge Field, who, in delivering the opinion of the court, said: "The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

"There must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons for him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice, would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard, and when he has appeared, saying, your appearance shall not be recognized and you shall not be heard. In the present case, the court not only in effect said this, but

<sup>1</sup> Cornell v. Williams, 20 Wall. 250.

<sup>2</sup> Winsor v. McVeigh, 93 U. S. 274.

immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

§ 74. EFFECT OF RES JUDICATA.—The effect of a final judgment that is *Res Judicata* is to create a *presumption* that every thing adjudged is true, and this presumption is *juris et de jure*. Presumptions *juris et de jure*, are those which are such absolute proof as to exclude all evidence to the contrary. *Est dispositio legis aliquam præsumentis, et super præsumptio tanquam sibi comperto statuentis*. It is called *præsumptio juris* because *a lege introducta est*. *Et de jure, quia super, tali præsumptione hoc inducit firmum jus, et habet eam pro veritate*. Presumptions *juris et de jure* cannot be destroyed, and the party against whom they operate, is not permitted to prove anything in opposition to them. It is an irrebuttable presumption, an inference which the law makes so peremptorily, that it will not allow it to be overturned by any contrary proof however strong. Thus, where a cause has once been regularly adjudicated upon by a competent tribunal, from which there either lies no appeal or the time for appealing has elapsed, the whole matter assumes the form of *res judicata*, and evidence will not be admitted in subsequent proceedings between the same parties to show that decision erroneous. *Res judicata pro veritate accipitur*. Thus the party adjudged to pay anything is presumed really to owe it, and the plaintiff or party in whose favor judgment is rendered may consequently compel the other party to pay the money by seizure and sale of his property, and he cannot contradict the judgment; and *vice versa*, when the judgment is in favor of the defendant dismissing the plaintiff's demand there arises so strong a presumption that the things demanded are not due that the action can not afterwards be renewed for the same cause of action or demand. The judgment produces an exception called *exceptio rei judicata* which precludes the action from being renewed.

As the effect of *res judicata* excludes all proof in contradiction of what has been adjudged; the party against whom judgment is rendered, is not permitted to show that there are any errors in ascertaining the amount due—*res judicatae si sub protectu computationis instatueretur, nullis erit litium finis*. But if

the error appear on the face of the judgment itself, it may be rectified ; as if there were several items, one for \$50, one for \$25, one for \$100, and the judgment should be for \$350, and when corrected is conclusive.

*Sic calculi error in sententia esse dicatur, appellare necesse non est ; veluti si iudex ita pronuntiaverit ; cum constet Titium Scio ex illa specie quinquaginta, item ex illa specie viginti quinquere debere ; idcirco Lutium Titium Scio centum condemnatum quoniam error computationis est, nec appellare necesse est, et citra provocationem corrigitur. Sed et si hujus quaestionis iudex sententiam. Confirmaveret si quidem ideo quod quinquaginta et viginti quinque fieri centum putaverit : atque idem error computationis est, nec appellare necesse est, si vero ideo, quoniam et alius species viginti quinque fuisse dixerit, appellatione locus est.*

§ 75. According to the Roman law as administered by the praetors, an action might be defended in any of the following modes :<sup>1</sup> 1st. By a simple denial or traverse of the facts alleged as the ground of action. 2d. By pleading new facts which constituted, *ipso jure*, a bar to the plaintiff's claim, although such claim might have been in the first instance well founded as a payment or a release. 3d. By showing such facts as might induce the praetor, on equitable grounds, to declare certain defenses admissible, the effect of which, if established, would be not to destroy the action *ipso jure*, but to render it ineffectual by means of the "*exceptio*," thus specially prescribed by the praetor for the consideration of the judge to whose final decision the action might be referred. *Exceptio* is, therefore, defined to be *quasi quaedam exclusio quae opponi actioni cujusque rei solet, ad elidendum id quod, in intensionem consentionemve deductum est*,<sup>2</sup> and according to Paulus : *Exceptio est conditio quae modum eximit reum damnatione, modo minuit condemnationem*.<sup>3</sup> In the class of exceptions referred to was included the *exceptio rei judicatae*. According to Justinian, *Item, si iudicio tecum actum fuerit, rive in rem, sive in personam, nihilominus obligatio durat, et*

<sup>1</sup> Mackeldy's Civil Law, 407.

<sup>2</sup> Brisson (ed cura Heinec).

<sup>3</sup> Dig. 44, 1, 22, Pr.

*ideo ipso jure de eadem re postea adversus te agi potest sed debeo per exceptionem rei judicatae adjuvari.*<sup>1</sup>

§ 76. Of the Exceptions *Rei Judicatae* and *in Judicium Deductae*. Gaius draws attention to a rule of practice in pleading, by which it was laid down that in certain actions the defenses of "judgment recovered" and "matter already in issue" could be set up as of course and under the general issue, whilst in certain other actions they could only be made use of when specially pleaded. The plea, technically called *exceptio rei in judicium deductae*, meant that the exact question between the parties had already been argued before the praetor, and had been settled by him in shape of a formula. That is to say, the plaintiff on some former occasion had raised the same points, and had called upon the defendant to reply to them *in jure*, and every step in pleading up to the *litis contestio* had been taken. The other plea, *rei judicatae*, meant that matters had gone even further than the *litis contestatio*. That is to say, the praetor had drawn the formula, and sent it down to the *judex*, with the precise questions of fact for trial, and that the decision of the *judex* had been given. There were three sets of actions in which the effect of these defenses require to be considered. First, a class of actions, based upon the *imperium* of the praetor, and unconnected with the strict rules and technicalities of the old civil law, and for which a time of limitation was prescribed, co-existent with the duration of each particular praetor in office. Second, there was a class of actions arising from obligations and dependent upon the old civil law, both by their very nature and from the fact that the declaration or *intentio* was of a civil law form—that is, not standing alone but preceded by a *demonstratio*. Third, there was a class of actions, either real, and arising from dominium or personal upon the case (*in factum*) and independent not only of the old strict civil law, but of all standing rules, civil or praetorian. In the first, the rule was that the defense of judgment recovered, "and matter still in issue" had to be specially pleaded. There were two reasons for this: first, because praetorian remedies were not affected by rules of pleading applicable to the old civil law actions, and, therefore, there was nothing in strict law

<sup>1</sup> Lib. 4, T. 13, § 10.

to prevent a second action being brought—it was necessary to allow a protection to the defendants in the shape of a plea; and, second, because during each succeeding praetor's year of office the nature and subject of the actions tried by his predecessor might easily be forgotten, and, therefore, a reminder in the shape of a special plea was absolutely necessary.

In the second class of actions the rule was, that where the same plaintiff brought a second action upon the same facts against the same defendant, the defense of "judgment recovered" or "matter still in issue" was available as part of the defendant's proofs under the general issue, and without any special plea. The reason for this was, that inasmuch as these were strictly legal actions with a civil law *intentio*, the plaintiff was *ipso jure*, by force of the civil law, barred from attempting any further claim.

In the third class there were two sets of actions—one founded on *dominium* or *jus in re*, the other, to a certain extent, founded on obligation, but not of the same kind as in the old civil law personal actions; and the rule applicable to such actions was, that in order to avail himself of his special defense, it was necessary for the defendant to raise the point by his pleas.

It is clear that in actions of the latter kind—personal actions, *in factum*—both the reasons which have been given above for requiring special pleas in actions based upon the *imperium* apply with extra force. For if proceedings, founded on standing rules of a particular praetor's edict, were not *ipso jure* a bar to further proceedings before a new praetor, still less could those proceedings be such a bar which had been allowed by the former praetor, merely because of his own personal theories of equity, enunciated at the time application for redress was made to him, and never cast into the form of general rules; and again, the details of such matters were even more liable to be forgotten than were those of the other kind. As to those actions springing out of *dominium*—real actions—the reason why a special plea of "judgment recovered" was necessary is obvious. In all these actions the plaintiff is maintaining a right against the whole world, and has no particular aforeknown person by whom this general right can be imperilled. As then he has to meet any and every opponent, so it is clear a victory over this or that person may not entirely, and, as a matter of course, silence even him, for he may

renew the attack on new grounds. In the case of an obligation claim between A. and B., where the judge decides that B. has not to perform the particular obligation, the processes are few and simple, and the ground of attack is single; but on a claim founded on a *jus in re* there may be a variety of proofs in support of a claim, shaped in more ways than one, and the ground of attack may be varied in proportion to the intricacy of the right at stake. Here, then, there is nothing in strict law, *ipso jure*, to prevent a plaintiff who has failed once from trying to succeed a second time; and, therefore, as in the first class of actions, so in this, to prevent vexatious litigation, the defendant was allowed to resort to his plea of "judgment recovered" as a matter of necessity." From this source the plea of judgment recovered or estoppel by record, as generally termed in our law, may be presumed to have derived its origin.<sup>1</sup> The *res judicata* was, in fact, a result of the definitive sentence, the decree of the judge, and was binding upon, and in general unimpeachable by the litigating parties; and was expressed by the familiar maxim, *res adjudicata pro veritate accipitur*, which must be understood, to have applied only when the same question was once judicially decided, and was again raised between the same parties, the rule being *exceptionem rei judicatae ob stare quoties eadem questio inter easdem personas revocatur*.<sup>2</sup>

§ 77. By the *litis contestatio* the parties submit themselves to the final issue of the legal controversy; by the proofs adduced they enable the judge to gain an insight into the subject matter in dispute; the judgment determines the existence or the non-existence of the legal claim. Hence, the maxim "*Res judicata pro veritate habetur inter partes*," that is to say, by virtue of a legally valid sentence a right is formally created. But the effect which results from the sentence does not reach beyond the parties to the suit and their successors (*inter partes*). It extends, however, to third parties exceptionally, as, for instance, in the case of the invalidity of a testament, in an indictment, in a judgment upon the *status* of a person, in judgments in cases of real servitudes, in joint ownerships and in other similar instances.

<sup>1</sup> Phillimore Roman Laws, 43.

<sup>2</sup> Digest 42, 1 pr.; 3 Digest Civil Law, Lib. 44; Tit. 2, § 24.

The benefits of a judgment are secured to the victorious party by means of the *actio judicati* or by the *exceptio rei judicatæ*, which may be pleaded either by the plaintiff or the defendant. The newly created obligation is enforceable by the *actio judicati*. The *exceptio rei judicatæ* bars every claim which may be adverse to the matter of the judgment *quotiens inter eandem personas eadem questio revocatur*. In respect to the requisites for the identity of a legal contention two things are needed: 1. The *exceptio* falls to the ground when no identity exists, even though the subsequent action may resemble the former one. 2. The *exceptio* is maintainable where the identity is actually present, though the previous point in litigation and the new one may be somewhat dissimilar. For example, a suitor has instituted the *hereditatis petitio* and has been non-suited, upon which he proceeds by the *rei vindicatio* for certain definite things. In this case the *exceptio rei judicatæ* comes into operation. Thus the distinction between the whole and part is irrelevant. In personal actions identity of right results from similarity of origin, but in real rights and in real actions the mode of origin is immaterial.<sup>1</sup>

§ 78. *Unde fit, ut si legitimo judicio debitum petiero, postea de eo ipso jure agere non possim, quia inutiliter intendo dari mihi oportere; quia litis contestatione dari oportere desiit. Aliter atque si imperio continenti judicio egerim; tunc enim nihilominus obligatio durat, et ideo ipso jure postea agere possum; sed deo per exceptionem rei judicatæ vel in iudicium deductæ sum-moveri.*<sup>2</sup>

Hence it comes to pass, that if I have claimed a debt before a *legitimum judicium*, I cannot afterwards sue on account of the same thing *ipso jure*, because I employed the formula "this thing

<sup>1</sup> Tom and Jenck, Mod. Rom. Law, pp. 93 to 95.

<sup>2</sup> The "*litis contestatio*" transformed the original right of the creditor into a new one. As soon as the suit passed to the "*judicium legitimum*," the novation of the obligation extinguished *ipso jure* the former right. If the suit were "*in iudicium imperio continens*," that is, under a special

*judicium* as distinguished from the "*judicium legitimum*," the "*litis contestatio*" did not have the effect of extinguishing the previous right *ipso facto*; but it empowered the defendant to repel the plaintiff, who attempted to recommence his action by the plea (*exceptio*) "*rei in iudicium deductæ*." Gaius, pp. 545, l. III., § 181.

ought to be given to me" (*dari mihi oportere*) improperly, since by means of the "*litis contestatio*" the duty to give (*dari oportere*) has ceased; it is otherwise if I have sued before a "*judicium imperio continens*," for then the obligation nevertheless continues, and therefore I am able subsequently to sue *ipso jure*; but I shall be rebutted by the plea "*re judicate*," or "*in judicium deductæ*."

§ 79. *Et siquidem imperio continenti judicio autem fuerit, sive in rem sive in personam, sive la formulæ quæ in factum concepta est sive ea quæ in jus habet intentionem, postea nihilominus ipso jure de eadem re agi potest. Et ideo necessaria est exceptio rei judicate vel in judicium deductæ.*

And if, indeed, an action included in the *imperium* has been prosecuted, whether it be real (*in rem*) or personal (*in personam*), whether the *formula* be conceived *in factum*, or whether it be one that has a legal *intentio*, a suit can nevertheless be subsequently instituted *ipso jure* on account of the same thing; and therefore the *exceptio rei judicate* or *in judicium deductæ* is necessary.<sup>1</sup>

*At vero si legitimum judicio in personam actum sit ea formulæ quæ juris civilis habet intentionem, postea ipso jure de eadem re agi non potest, et ob id exceptio superflua est. Si vero vel in rem vel in factum actum fuerit, ipso jure nihilominus postea agi potest, et ob id exceptio necessaria est rei judicate vel in judicium deductæ.*

On the contrary, if a person has proceeded in a *legitimum judicium in personam* with the formula, which has an *intentio* framed according to the *jus civile*, he cannot afterwards sue *ipso jure* for the same thing, and hence the *exceptio* is superfluous; but if he has proceeded either *in rem* or *in factum* he can, nevertheless, subsequently proceed in another action *ipso jure*, and on account of that, in such a case the *exceptio rei judicate* or *in judicium deductæ* is necessary.<sup>2</sup>

<sup>1</sup> Gaius, p. 718, l. IV. § 106

<sup>2</sup> The "*exceptio rei judicate*," as the term denotes, implied that the controversy had been before the *judex*, and had received his decision. Similar

remarks may be made in regard to the "*exceptio in judicium deductæ*." The *exceptio*, as a pleading, negatived the plaintiff's demand. The plea of "*res adjudicata*" was said to be *per-*

§ 80. *Alia causa fuit olim legis actionum. Nam qua de re actum semel erat, de ea postea ipso jure agi non poterat; nec omnino ita, ut nunc, usus erat illis temporibus exceptionum.*

It was otherwise formerly with the *legis actiones*. For if a suit had once taken place concerning a thing, a second suit could not be subsequently instituted on account of that same thing. Nor were *exceptiones* in use in those times as they are now.<sup>1</sup>

§ 81. "If you have been sued in a real or personal action, the obligation nevertheless remains; and, therefore, in strict law you may again be sued in the same cause; but in case of a second suit you may be relieved by pleading that the cause has already been adjudged."

The exception here sketched out by Justinian is founded on the maxim of Ulpian, *Res judicata pro veritate accipitur*. And it is for the public good that every legal controversy should be decided in one action, in order that litigation may not be indefinitely multiplied, and to avoid the confusion which would arise from conflicting decisions upon the same matter.

But on the other hand, as no man can be condemned unheard, the rule obtains, *Res inter alios judicata nullum aliis præjudicium faciunt*.

It follows from these principles, that the same claims must not be adjudicated upon more than once between the same parties, except on appeal. Such is the object of the plea called *exceptio rei judicatæ*.

The general rule is, that this exception is a good defense

*emptory*, and it was a complete and, as the rule, a perpetual answer to the plaintiff's demand. There was in such cases what the jurists call a consumption of the right of action. This important result followed *ipso jure*, as we see by the next section in the case of the "*legis actiones*," and also in all other cases in the procedure by the Formula in a "*legitimum judicium in personam*," with a Formula "*in jus concepta*." Thus, in all actions *in rem* and *in factum*, the defendant

could employ against the plaintiff who endeavored to bring the same action a second time, the "*exceptio rei in judicium deductæ*," and if the judgment had been actually pronounced, the plaintiff might be met by the "*exceptio rei judicatæ*." The effect, however, of the "*in integrum restitutio*" was to place the plaintiff in the same position as if the matter had not been brought into *judicium*. See Puchta's Instit. Vol. II. pp. 181, 182; Gains, p. 719, l. IV. § 107.

<sup>1</sup> Gaius, p. 720, l. IV. § 108.

when the same question and between the same parties is again litigated (otherwise than on appeal) after having been judicially decided. This exception is not competent unless the same litigation be renewed; that is to say, between the same parties, touching the same thing, and upon the same *causa petendi* or title.<sup>1</sup>

§ 82. The mode in which this particular exception was, in practice, made available under the Roman law, may be illustrated as follows: B., having no title to a horse, sells it to C. A. is the rightful owner of the horse and brings an action against C., who recovers a judgment against A. Afterwards C. loses the horse and A. obtains possession of it. C. brings an action against A. to recover possession of the horse. A. files an answer denying C.'s title to the horse. C. successfully estops A. from denying his title by pleading the *res adjudicata*, or former judgment between the same parties.

§ 83. The *exceptiones* which were unknown to the old Roman law, were introduced to mitigate its rigor by letting in defenses which were not admissible or valid *stricti juris*; by long usage and custom these exceptions became established in such a manner as to be recognized by the *juscivile*, and ceasing to depend merely upon the will of the praetor, became in some measure compulsory upon him. In the civil law the plea of judgment recovered at once suggests itself as analogous to the *exceptio rei judicata* above mentioned, as directly founded on the fundamental principle of the law, "*nemo debet bis vexari pro una eadem causa.*" With the rule of the civil law rightly understood, which, in the language of Ulpian, says: *res adjudicata pro veritate accipitur*, the law of England and America generally agrees.<sup>2</sup>

§ 84. The sound reason of the rule cannot be better expressed, than Paulus, in the digest, thus lays it down: *Singulis controversiis, singulas actiones unamque, judicati finem sufficere*,

<sup>1</sup> Bow. Mod. Civ. L. pp. 308, 309.

<sup>2</sup> Preston v. Peake, E. B. & E. 336; Mortimer v. South, &c. Co., 1 E. & E. 382; Barrs v. Jackson, 1 Y. & C.

597; Notman v. Anchor, &c. Co., 6 C. B. N. S. 536; Spang's Case, 5 Co. 61; Brennan v. Moyer, 98 Pa. St. 274; Ferrer's Case, 6 Co. 9; Davis v. Blodsoe, 69 Ala. 362.

*probabili ratione placuit; ne aliter modus litium multiplicatus summam atque inexplicabilem faciat difficultatem; maxime, Si diversa pronunciarentur.*<sup>1</sup>

Other passages in the same division of the digest are to this effect; thus Ulpian says: "*Et generaliter, (ut Julianus definit) exceptio rei judicatae obstat, quoties inter easdem personas eadem quaestio revocatur, vel alio genere judicii.*"

Paulus says: "*Cum quaeritur, haec exceptio noceat necne? inspiciendum est an idem corpus sit.*"<sup>2</sup> *Quantitas eadem, id m jus, an eadem causa petendi et eadem conditio personarum: quae nisi omnia concurrunt, alia res est.*" And again, "*Si quis interdicto egerit de possessione, postea in rem agens non repellitur per exceptionem; quoniam in interdicto possessio, in actione proprietas vertitur,*" and Neratius, "*cum de hoc, an eadem res es, quaeritur, haec spectanda sunt; personae; id ipsum de quo agitur: causa proxima actionis: nec jam interest, quid, ratione quis eam causam actionis competere sibi existimasset, prout ac si quis, postea quam contra eum judicatum, esset, nova instrumenta causae suae repperisset.*"<sup>3</sup> Voet, in his commentary on this title, says: "*Non aliter tamen huic exceptioni locus est, quam si lis terminata denuo moveatur inter easdem personas, de eadem re et eadem petendi causa; sic ut, uno, ex, his, tribus deficiente, cesset. Eadem res intelligitur quotiens apud judicem posteriorem id quaeritur quod apud priorem quaesitum est. Eadem petendi causa est etiam, licet non eadem agatur actione, sed alio judicii genere eadem quaestio ventiletur; cum eundem causam non tam actio faciat, quam potius origo petitionis. Quod ratione, cum propter rei emptae vitium tale, propter quod eam emptor empturus non fuisset, et redhibitoria et quanti minoris actio com-*

<sup>1</sup> Digest, lib. 44, tit. 2, sec. 6.

<sup>2</sup> Digest, lib. 44, tit. 2, sec. 6.

<sup>3</sup> Digest, lib. 44 tit. 2, sec. 12.

In order that a *res judicata* should be available either as a bar or an exception, it was necessary that there should have been, in the former action, the same thing as the subject-matter of the litigation, the same quantity, the same right, the same ground of action, the same parties

The object of the rule of *res judicata* is put upon two grounds, the one, public policy, that it is the interest of the state that there should be an end of litigation, and the other the hardship on the individual that he should be vexed twice for the same cause.

<sup>4</sup> Digest, lib. 44, tit. 2, sec. 14.

<sup>5</sup> Digest, lib. 44, tit. 2, sec. 27.

*petere possit, sic ut actio, quanti minoris, tunc redhibitionem tunc continent. Julianio placuit cum qui, alterutra eorum, egerit, si altera, postea agit, rei iudicatis exceptione submovendum esse."* Vinnius, in a note to the 13th title of the 4th book of the institutes upon the words "*per exceptionem rei iudicatis*," says: "*Quia ita agenti obstat, si eadem questio int. in eadem re coecatur, nil est, si omnia sint eadem, idem corpus, eadem quantitas, item jus, eadem causa petendi eadem conditio personarum.*"

§ 84 a. In order that the *exceptio rei iudicatis* should produce its effect, the concurrence of the following conditions were indispensable:

It was necessary that the new action should present for decision the same question as had been already determined by the first suit.

The suit should be between the same parties or their legal representatives.

*Exceptio rei iudicatis obstat, quoties int. easd. in personas eadem questio re coecatur vel alio genere iudicii.*<sup>1</sup>

When the question was not the same, the exception could not be advanced, even though there might exist other points of contact between the same suit. But from the moment that the question was the same, it mattered not that the means invoked were different, or that the action was presented under another form. "*Et ideo si hereditate petita singulus res petat, vel singulas rebus petitis hereditatem petat, exceptione summovebitur;*"<sup>2</sup> and the same principle, "*Exceptio jurisrandi non tantum si ea actione quis utatur, cujus nomine egerit iusjurandum, opponi debet, sed etiam, si alia, si modo eadem questio in iudicium deducatur.*"<sup>3</sup> And in the same way, it mattered little whether the new action was contrary to the terms of a judgment which rejected a prior demand, or even to the facts which that judgment had recognized as established, and upon which the judge had founded his decision. "*De eadem re agere videtur, et qui non eadem actionē agit qua ab initio agebat, sed etiam si alia experitur, de eadem tamen re.*"

The exception might be advanced, when a certain point had

<sup>1</sup> L. 3, D. eod.

<sup>2</sup> L. 7, § 4, D. H. T.

<sup>3</sup> L. 28, § 4, D. de iurejur. (12, 2).

<sup>4</sup> L. 5, D. h. t.

been decided, not as the principal question, but incidentally whether because it formed the basis, or essential condition of some other claim or came within the *legitimation ad cursum*.<sup>1</sup> Usually the identity of the object coincided with that of the question\* (hence the expressions, "*eadem res*," "*idem corpus*," "*quantitas eadem*").<sup>2</sup> But the contrary might happen; and it was then only the latter which was considered. "*Toties eandem rem agi, quoties apud judicem posteriorem id quaeritur quod apud priorem quaesitum est.*"<sup>3</sup>

Thus if the thing the object of the second action, was to the object of the first action, as a part is to the whole, the judgment which had rejected the claim of the plaintiff to the whole was equally applicable to the part. "*Si quis cum totum petrisset; partem petat, exceptio rei judicatae nocet, nam pars in toto est, eadem enim res accepitur, etsi pars petatur ejus. quod totum petitum est; nec interest utrum in copore hoc quaeratur, an in quantitate vel in jure.*"<sup>4</sup> If the claim rejected by the prior judgment constituted the indispensable condition of right that the new action had in view, this judgment might be opposed by the defendant, and reciprocally if the plaintiff had obtained in the first action the declaration of an absolute right, the judgment was considered as refusing the same right to the adverse party; and if the latter—the defendant in the action—chose subsequently to assert his right in the character of plaintiff, he would be defeated by the *exceptio rei judicatae*, "*cum judicatur rem meam esse simul judicatur illius non esse.*"<sup>5</sup>

§ 84 b. "*Quoniam de ejus quaque jure quaesitum videtur, cum actor petitionem implet.*"<sup>6</sup> Even in case of identity of object and of tenor of action, the question judged might be different, by reason of a difference in the origin of the right which was the basis of the suit. This was the case when the actions were founded on different obligations. In fact, obligations take their distinctive character and their individuality from the mode of their creation,

<sup>1</sup> L. 7, §§ 4, 5; L. 8, L. 11, §§ 3, 10. L. 18, L. 26, § 1, D. h. t.; L. 25, § 8, D. fam. erisc. (10, 2).

<sup>2</sup> L. 12, 13, 5 D. h. t.

<sup>3</sup> L. 7, § 1, D. h. t.

<sup>4</sup> L. 7, pr. D. h. t.; L. 14, pr. L. 21, §, D. h. t.; L. 27, § 8, D. de pact 2, 4).

<sup>5</sup> L. 40, § 2, D. de proc (3, 3).

<sup>6</sup> L. 15, L. 30, § 1, D. de exc. rei jud.

and cannot be separated therefrom. It follows that a difference between the circumstances which created the obligation involves another as to the action for which it may give grounds. *Initio ita considerint hae duae obligationes, ut altera in iudicium deducta, altera nihilominus integra remaneat. Non ut ex pluribus causis debeat nobis idem potest, ita ex pluribus, causis idem possit nostrum esse.*<sup>1</sup> It is otherwise with respect to absolute or real rights, which are independent of the manner in which they may have been acquired; so that a difference in this particular effects no change in either their nature or character. If, then, the ownership of a thing has been rejected by the judge, and the same plaintiff returned to the charge, alleging another mode of acquisition, he would be defeated by the *exceptio rei iudicatae*, unless he could invoke facts and circumstances subsequent to the judgment pronounced in the first suit (*Itaque acquisitum quidem dominium aliam causam facit mutata autem opinio petitoris non facit*<sup>2</sup>) *causa nova superveniens*, or that he had on the previous occasion limited the question submitted to the judge, to one sole mode of acquisition (*causa adjecta expressa*), in which case the effect of the *res iudicatae* would necessarily be confined within the same limits. *Actiones in personam ab actionibus in rem hoc differunt; quod cum eadem res ab eodem mihi debeat, singulas obligationes singulae causae sequuntur, nec ulla earum alterius petitione vitatur, at cum in rem ago non expressu causa, ex qua rem meam esse dico, omnes causae una petitione apprehenduntur, neque enim amplius quam semel res mea esse potest; salpius autem deberi potest.*<sup>3</sup> *Denique et celsus subiit; si hominem petrero, quem ob eam rem meum esse existimari, quod mihi traditus ab alio est; cum is ex hereditaria causa meus esset, rursus petenti mihi obstatorem exceptionem. Si quis autem petat fundum suum esse, eo quod Titius eum sibi tradiderit; si postea alia ex causa petat; causa adjecta non debet summoverti exceptione.*<sup>4</sup>

<sup>1</sup> L. 18, D. de O. et A. (44, 7); L. 159, D. de R. I.

<sup>2</sup> L. 11, § 5, § 4, h. t.; L. 14, § 1; L. 21, § 3; L. 25, pr. D. h. t.; L. 42, D. de lib. causa (40, 13).

<sup>3</sup> L. 14, § 2, D. h. t.; L. 11, § 1 et § 2, P. h. t.

<sup>4</sup> L. 93, § 1, D. de leg. III. (2), L. 3, § 4, D. de aq. vel. omitt. poss. (41, 2).

§ 85. The second condition indispensable to constitute the *res judicata* was that the judgment should have been pronounced between the same parties. Judgments could neither benefit or injure third parties, nor was there any distinction, in this respect, between judgments which affected absolute rights and those which referred to obligations. "*Etsi eadem questio in omnibus iudiciis vertitur, tamen personarum mutatio, cum quibus singulis suo nomine agitur, aliam atque aliam rem facit saepe constitutum est, res inter alios iudicatas, aliis non praejudicare.*"<sup>1</sup>

The identity of the parties did not, however, require that the suit should be by and against precisely the same persons who had been parties to the former proceeding, the character of identity extended also to their respective successors, universal or particular, provided that the quality of successor had been acquired subsequently to the judgment in question.<sup>2</sup> *Rei iudicata a persona auctoris ad eundem transire solere, retro autem ab eundem ad auctorem reverti non debere, quare, si hereditariam rem venderis, ego eandem ab eundem petico et vicero, petenti tibi non opponam exceptionem at si ea res iudicata non sit inter me et eum cui vendidisti.*<sup>3</sup> In the same way, if a person called to appear prominently as a party to a suit had abandoned his position in favor of him from whom he held his rights, judgment could be asked, for and against that person, exactly as if he himself had maintained the suit.<sup>4</sup> *Rei iudicatae exceptio tacite continere videtur omnes personas, quae rem in iudicium deducere solent. Hoc jure utimur, ut ex parte actoris in exc. rei jud. hae personae continerentur, quae rem in iudicium deducunt, inter nos erunt procurator cui mandatum est, cet.*<sup>5</sup>

§ 86. *Scientibus sententia, quae inter alios data est, obest, cum quis de ea re cujus actio vel defensio primum sibi competat sequenti agere patiatur quia ex voluntate ejus de jure, quod ex persona agentis habuit, iudicatum est.*"

<sup>1</sup> L. 2, C. quito res jud. (7, 56); L. 1, L. 3, L. 29, L. 22, D. de exc. rei jud.; L. 7, § 4, D. h. t.; L. 63, D. de R. I. (42, 1).

<sup>2</sup> L. 11, § 3, D. de jurej.

<sup>3</sup> L. 11, § 9, 10 L. 29, 29, § 1. L. 9, § 2, D. de. exc. rei jud.

<sup>4</sup> Julianus L. 3, § 1 D. de Pign. (20, 1)

<sup>5</sup> L. 63 D. de re jud. (42, 1).

<sup>6</sup> L. 4, D. h. t. L. 11, § 7. L. 25, § 2, D. h. t. L. 56, D. de jud. (5.1.). L. 27, L. 66. D. de proc 3, 3, Keller I. C § 39-44

Exceptionally, and in certain special cases, the authority of the judgment extended to others than those who had been parties to the former action (*Pronuntiatio sive sententia jus facit*). It was thus :

I. In some contest respecting hereditary right.

II. In confessory and negatory actions, when one of the co-proprietors of the dominant or of the sub-servient property had already been concerned in a suit as to the existence or non-existence of a praedial servitude.<sup>1</sup> *Itaque de jure quidem ipso singuli caperentur, et victoria et alis, proderit et quisquis defendit, solidum debet restituere; quia divisionem haec res non recepit.*

III. In decisions as to the status of persons and as to family rights if they concerned paternity or patronage; but with this modification, that the *res judicata* could not be opposed to him who claimed to be the true owner of the right previously contested and adjudged between other persons.”

Finally, it must be observed that the principle which declares that a demand already rejected by the judge should not be reasserted, was applicable, in the same manner and within the same limits, to the case where it was sought to contest a right which had been adjudged to the plaintiff in a previous action. The judge called upon to decide in a fresh contest, was bound to take the prior judgment as the basis of his own decision, in order that the principle “*res judicata pro veritate accipitur*” might be realized to its full extent.<sup>2</sup>

*Quia et si petissem a te hereditatem et probassem meam nihilominus ab altero petendo, id ipsum probari necesse habere.* To this hypothesis must also be applied, the rule, that the adjudication of the whole includes that of a part; and that the recognition of a right implies the recognition of all that immediately and necessarily accompanies it.

§ 88. HOW THE DOCTRINE WAS MADE AVAILABLE.—It will be

<sup>1</sup> L. 4, § 3, 4. D. si. serv. vind (8, 5).

<sup>2</sup> L. 1, § 16, L. 2, L. 3, pr. D. de agnosc. et al. lib. (23, 5). L. 1, § 4, D. de lib. exhib. (43, 30). L. 14. D.

de jur. patr. (37, 14). L. 42, D. de lib. causa (40, 12). L. 5 D. Si ingen. esse dic. (40, 14).

<sup>3</sup> L. 207. D. de R. J. L. 11, § 3. L. 12, D. de jurej. L. 50, § 1, D. de leg. 1.

apparent from an examination of the civil law rules and the essential requirements of the *exceptio rei judicatæ* that the doctrine at the present time as developed in the subsequent parts of this work has met with little if any modifications. The civilians thus state the principles: "In order to have this effect three things are requisite: 1st. *The demand* MUST BE OF THE SAME THING. 2d. *It must* BE FOR THE SAME CAUSE. *It must be* MADE IN THE SAME MANNER. *Quum quæritur hæc exceptio (rei judicata) noceat necne; inspiciendum est an idem corpus sit, quantitas eadem, idem jus! et an eadem causæ petendi, et eadem conditio personarum; quæ nisi omnia concurrant, aliu res est.* If the three things concur it is immaterial whether the action is *eodem an diverso genere judicii*.

§ 89. *Of the first requirement ut sit eadem res.* This principle, that the *exceptio rei judicatæ* can only be made available in case the second action is for the same demand as the first, must not be understood too literally. "*Idem corpus in hac exceptione non utique omni pristina quantitate vel servatâ, nulla adjectione diminutione ve facta; sed pinguis pro communi utilitate accipitur.*" Thus, the flock which I now demand does not consist of the same sheep which it did at the time of the former action; the action is for the same thing, therefore it is not maintainable. "*Si petiero gregem (et victus fuero), et vel aucto vel minuto numero gregis, iterum eundem gregem petere obstabit mihi exceptio.*" It is the same cause of action when the subsequent action is for part of the same demand. "*Sed et si speciale corpus ex grege, petam, puto obstaturam exceptionem.*" Thus it is laid down by Ulpian: "*Si quis, quum totum petisset, partam petat, exceptio rei judicatæ nocet, nam pars in toto est; eadem enim res accipitur, et si pars petatur ejus quod totum petitum est, nec interest utrum in copore hoc quaeratur, an in quantitate, vel in jure.*"

§ 90. It is the same demand or cause of action which has already been adjudicated, when the subsequent action is based upon anything issuing from it, which could only belong to the defeated party as far as the thing from which it issued would have done so. Thus, if an action is brought to recover a female slave and the defendant recovers judgment, the plaintiff cannot afterwards upon the same ground recover a child of which

she has been delivered, for the plaintiff can have no other title to the child than he had to the mother, for that would be renewing the question which had been determined by the former judgment. "*Si ancillam præquantem petiero (suppl. et eictus fuerim, et post litem contestatam conceperit et peperit, mox partum ejus petum utrum idem petere videor, an aliud, magne questionis est, et quidam ita definiiri potest, totis oculis rem agi. quæti, apud Judicem posturam id quaeritur, quod apud priorem quaesitum est: in his igitur fere omnibus exceptio (rei judicata) nocet.*"

§ 91. If suit is brought for the recovery of the principal debt and judgment is rendered against the party claiming it, he cannot afterwards maintain an action for the interest which would only be due as arising from the principal. The converse of this does not hold good, for although a party has failed in an action to recover interest he may still recover the principal, for the principal may be due in cases when the interest is not.

"*Si in judicio actum sit, usuraque solæ petitæ sint, non est verendum ne noceat exceptio rei judicata.*"

So if an action is brought for a path over a party's land and subsequently another action is brought for a roadway. Is it the same cause of action, and will the defense of *res judicata* be available? It would seem that it should, and that it is the same cause of action, as the roadway seems to include the foot path and as the action for a foot-path has been adjudicated against the party it follows *a fortiori* that the roadway does not exist; but the contrary is true, and the *exceptio rei judicata* is not available, for the reason that as these rights of servitude are entirely distinct, the demand of one of them has a different object from the demand of the other, and therefore the two causes of action are not the same, and the defense of *res judicata* is inapplicable. The decision in the prior action was that no foot-path existed; it does not follow that another kind of servitude for a highway does not exist, in regard to which there was no question made in the former action. Thus Ulpian says: "*Si qui siter petierit, deinde actum petat, puto fortius defendendum aliud videri tunc petitum aliud nunc et ideo exceptionem rei judicata cessare.*" It is otherwise when the demand, although more extensive, is for the

same kind of servitude, of which Africanns gives the following example: "*Egi tecum jus mihi esse aedes meas usque ad decem pedius altius tollere, post ago jus mihi esse usque ad viginti pedus altius tollere; exceptio rei judicatae proce dubio obstat, sed et si rursus ita agam jus mihi esse ad alios decem pedes tollere, obstat exceptio, cum aliter superior pars jure haberi non possit, quam si inferior quoque jure habeatur.*"

§ 92. Of the second requirement, that *the cause of action be the same, ut sit eadem causa petendi*. It is not sufficient ground for the defense of *rei judicata* that the second action is for the same thing, unless it be for the same cause, *oportet ut sit eadem causa petende*. There is in this respect a distinction between personal actions and real. Although a party fails in a personal action in recovering judgment for a sum of money due by virtue of a certain obligation, this will not prevent a subsequent recovery of the same thing as due in a different manner. Thus, where A. agrees to give B. a certain chattel or a sum of money for a particular piece of work, as B. may elect, and subsequently B. purchases the chattel and B. commences an action *exemptio* for the delivery of the chattel and fails by reason of his inability to prove the sale; this will not preclude B. from bringing a subsequent action for the same chattel, by the *actio ex prescriptio* by virtue of the agreement. On the contrary, in real actions, if the claim is for a piece of land which is claimed belongs to the plaintiff, and judgment is rendered against him, he is barred from maintaining another action for the same land, even if it is claimed under a different demand from the prior one. The reason of that distinction is that the same thing may be due in a personal action by virtue of different obligations, and there are as many different claims and as many actions against the debtor as there are many causes of obligation, which actions involve as many different questions, and a judgment in one decides nothing in regard to the others. The judgment in the action *exemptio* that the plaintiff is not entitled to the chattel by virtue of the sale does not establish the fact that he is not entitled to it on a different contract, and consequently does not preclude an action for the same chattel on an action founded on such contract.

It is otherwise in regard to the right of property; although

there may be several different claims for the same thing, there can be only one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property, for that would be to renew the question already decided, for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated. Thus Paulus says: "*Actione in personam ab actionibus in rem in hoc differunt, quod cum eadem res ab eodem mihi debeat, singulis obligationibus singulae causa sequuntur nec ulla earum alterius petitione citiatur ut quum in rem ago, non expressam causam ex qua rem meam esse dico eamque causa non petitione apprehenduntur; neque enim amplius quam semel res mea esse potest saepius autem deberi potest. Hence the rule, non ut ex pluribus causis deberi nobis idem potest, ita pluribus causis idem possit nostrum esse.*"

§ 93. In regard to real actions, the judgment is an estoppel only in cases where the party claims as owner in a general manner, and without any qualification; but if the party claims the ownership in a restricted or qualified manner, a judgment that he was not entitled to it on that ground would not prevent an action upon any other. Thus, if A. claimed an estate as heir at law and disputed the will of the testator on the ground of its invalidity or that it was forged, he would not be precluded from claiming it on any other ground. *Etsi quaestionis titulus prior inefficacis testamenti causam habuisset judicatae rei prescriptio non obstaret eandem hereditatem alia causa vindicanti.*

No matter how general the claim of ownership may have been in the first action, it does not preclude the party from maintaining an action by virtue of a title which has become vested in him subsequently; for the judgment that the party was not owner of the property at the time of its rendition does not prevent him from subsequently acquiring title. The question whether the same party has since acquired the property by a title which has accrued since the judgment is entirely different from that before decided, for it is a well-settled principle that

the *exceptio rei judicatee* only applies when the same question is renewed which has already been decided.

§ 94. To make a judgment, pleaded in bar, a technical bar, it must appear to have been between the same or substantially the same parties. A nominal, but not substantial, difference in parties does not effect the estoppel.<sup>1</sup> The general rule that a judgment of a court having jurisdiction of the subject matter and the parties and the process, and rendered directly upon the point in question, is conclusive between the same parties, is not complied with, when the same person, though a party in both suits, is such in different capacities—in the one individually, in the other as administrator. So, if an action is brought by A. as guardian of B., a minor, a judgment against A. as guardian is in his official capacity and will not preclude him from maintaining a subsequent action in his own right, individually, and *vice versa*. For in the prior action A., properly speaking, was not a party. The real party in interest was the minor, by A., his guardian. The subsequent action in A.'s own name is not then between the same parties; the person may be the same but in different capacities, and the former action cannot preclude him from maintaining the subsequent action;<sup>2</sup> but where they litigate their individual rights in the same action the judgment is conclusive. Thus, where an executrix, who was also the widow of the testator, being sued in the former capacity only, but raising in her defense of the suit the issue of her rights as usufructuary, will be personally concluded by the judgment and cannot subsequently attack its validity on the ground that she was not cited in her individual capacity.<sup>3</sup> So, a

<sup>1</sup> *Mondell v. Steel*, 8 M. & W. 858; *Thompson v. Roberts*, 24 How. 233; *Livermore v. Henschel*, 3 Pick. 33; *Belden v. Seymour*, 8 Conn. 304; *Lawrence v. Hunt*, 10 Wend. 80; *Rapelye v. Prince*, 4 Hill, 119; *Calhoun v. Dunning*, 4 Dall. 120; *Barker v. Cleveland*, 19 Mich. 230; *Stoddard v. Thompson*, 31 Iowa, 80; *Cartwright v. Carpenter*, 8 Miss. 338; *Gardner v. Ruisbeck*, 28 N. J. Eq. 71; *Daven-*

*port v. Barrett*, 51 Ind. 329.

<sup>2</sup> *Landers v. Amo*, 65 Me. 26; *Hopkins v. Connell* 2 Tenn. Ch. 326; *Robinson's Case*, 5 Co. 32; *Rathbone v. Hoovey*, 58 N. Y. 463; *Leggett v. R. R. Co.*, 1 Q. B. D. 599; *Jackson v. Mills*, 13 John. 463; *Sinclair v. Jackson*, 8 Cow. 565; *Jackson v. Hoffman*, 8 Cow. 271; *Metters v. Brown*, 1 N. & C. 686.

<sup>3</sup> *Denegre v. Denegre*, 33 La. An.

judgment in favor of the plaintiff in an action brought by him against a sheriff for taking goods, and in which the sheriff justified under an execution in favor of A. and against B. is not *res judicata* in a subsequent suit brought by the same plaintiff against the sheriff for taking the same goods and in which the sheriff justifies under an execution in favor of C. and against B. Though the party—the sheriff—was the same in both suits, he is not the same party in respect to the interests in the two suits,<sup>1</sup> for the reason that the doctrine of *res judicata* applies only between the same parties.

§ 95. It is immaterial whether the action be in the same or different mode of procedure (*eodem an diverso genere judicii*), provided these three requirements which are mentioned exist. The authority of *Res Judicatae* equally attaches whether the matter in issue is in the same form of action or another. *Eodem an diverso genere Judicii generaliter, ut Julius definit, exceptio res judicatae obstat, quoties inter eundem personam eadem questio revocatur vel alio genere judicii.* Thus in an action by A. against B., *quanto minoris*, to obtain an abatement in the price of a chattel which A. alleges is unsound, against which B. has given a warranty, and the judgment is rendered in favor of B. on the ground that there was no fault, or that the warranty did not cover it, and subsequently A. institutes an other action to rescind the sale for the same fault, the plea of *res judicatae* is available, although the matter in issue is presented in a different form and aims at a different conclusion, the three requisites above stated concur, it is the same chattel, *eandem res*; there is also *eadem causi penditii* for the question in both cases is that of warranty, and the question is between the same parties, the difference of the actions and of the conditions does not prevent their having the same effect, and being *eandem res, cum quis actionem mutat, et ea paretui, dummodo eandem re experiatur etsi diverso genere actionis quam instituat ridetur de eadem re agere.* Thus to an action of *indebitatus assumpsit* for the value of goods, a judgment for the defendant, in trover, for the same goods may be pleaded in bar, provided it appear, by proper averments in the plea, that the

689, *Young v. Babilon*, 91 Pa. S. 280, Rogers, 77 Pa. S. 160.

*Vensell's App.*, 77 Pa. S. 71, *Cox v.*

<sup>1</sup> *Stoops v. Woods*, 45 Cal. 439.

question between the parties was the same in both actions. So, *e converso*, a recovery in *indebitatus assumpsit* for the value of the goods may be pleaded in bar to an action of trover for the same goods. In these cases the principal consideration is whether it be precisely the same cause of action in both, which may appear either by proper averments in the plea or by proper facts stated in a verdict. One great criterion is that the same evidence will maintain both actions. So a judgment *in assumpsit* upon a policy of insurance is a bar to a subsequent action of covenant on the same policy.

§ 96. If, however, it be doubtful whether the second action is brought, *pro eadem causa*, it is a proper test to consider whether the same evidence would sustain both actions. Two causes of action are held to be the same, only when the same evidence will sustain both. A convenient and safe test for ascertaining whether or not the judgment in one action should be a bar to another is to consider whether the same evidence would or would not sustain both. When the evidence in a second suit is sufficient to secure or sustain the judgment in the first, it is a bar.<sup>1</sup>

§ 97. It is not essential that the successive causes of action should be the same, but when the very matter or thing which it

<sup>1</sup> *Hitchin v. Campbell*, 2 W. Black, 778; *Martin v. Kennedy*, 2 B. & P. 71; *Buckland v. Johnson*, 15 C. B. 163; *Wadsworth v. Bentley*, 23 L. J. Q. B. 3; *Hunter v. Stewart*, 4 De G. F. & J. 178; *Dolphin v. Aylward*, 15 Ir. Eq. 583; *Dubois v. R. R. Co.* 5 Fish. Pat. Cas. 201; *Riker v. Hooper*, 35 Vt. 457; *Vooght v. Winch*, 2 B. & A. 662; *Connery v. Brooks*, 73 Pa. 80; *Lindsey v. Thompson*, 1 Tenn. Ch. 272; *Stowell v. Chamberlain*, 60 N. Y. 272; *Ewald v. Waterhouse*, 37 Mo. 602; *Moore v. Watts*, 1 Ld. Raymd. 614; *Lawrence v. Vernon*, 3 Sumner, 20; *Miller v. Mannice*, 6 Hill, 114; *Overton v. Harvey*, 9 C. B. 324; *Eastman v. Cooper*, 15 Pick. 276; *Ware*

*v. Percival*, 61 Me. 391; *Slade's Case*, 4 Co. 92; *Follansbee v. Walker*, 74 Pa. 306; *Percy v. Foote*, 36 Conn. 103; *Cannon v. Brame*, 45 Ala. 262; *Taylor v. Castle*, 42 Cal. 371; *Crocker v. Routon*, Dud. 254; *Clegg v. Dear-den*, 12 Q. B. 576; *Johnson v. Smith*, 8 Johns. 383; *Rice v. King*, 7 Johns. 20; *Gregory v. Bural*, 2 Ed. Ch. 217; *Steinbach v. Ins. Co.*, 77 N. Y. 498; *Waltz v. Bourway*, 25 Ind. 380; *Gates v. Gorham*, 3 Vt. 317; *Hadley v. Green*, 2 Tyrw. 390; *Wiat v. Essington*, 2 Ld. Raym. 1410; *Harding v. Hale*, 2 Gray, 400; *Edwards v. Stewart*, 15 Barb. 69; *Marsh v. Pier*, 4 Rawle, 285; *Dawley v. Brown*, 79 N. Y. 391; *Gardner v. Raisbeck*, 28 N. J. Eq. 71.

is sought to litigate must have been adjudicated in the prior action, the bar or estoppel is complete.<sup>1</sup> Thus when in an action to recover taxes paid on land for certain years, a particular question has been adjudicated, such adjudication will be conclusive on the parties and their privies in another action to recover taxes paid for subsequent years, when the subsequent payments were made under precisely the same claim of right and under the same circumstances as the former.<sup>2</sup>

§ 98. Where specific facts or questions have been adjudicated and determined in a former suit, and the same facts or questions are again put in issue in a subsequent suit between the same parties, their determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. Such estoppel to relitigate the same question is equally available to the plaintiff as to the defendant.<sup>3</sup> Thus an action of

<sup>1</sup> *Goodenow v. Litchfield*, 59 Iowa, 226; *Harryman v. Roberts*, 52 Md. 64; *R. R. Co. v. Schwartz*, 13 Ill. App. 490; *Caylus v. R. R. Co.*, 76 N. Y. 600; *Roberts in re*, 50 How. Pr. 130; *Cleve v. Powell*, 1. M. & R. 208; *Hitchen v. Campbell*, 2 Bla. 830; *Routledge v. Hislop*, 2 E. & E. 549; *Flitters v. Alfrey*, L. R. 10 C P. 29; *Bank v. Rude*, 23 Kans. 123; *Hartson v. Shauklin*, 58 Cal. 248; *Gordiner's Appeal*, 89 Pa. St. 528; *Louis v. Trustees*, 109 U. S. 162; *State v. Boothe*, 68 Mo. 546; *Schrauth v. Bank*, 8 Daly. 106; *Gibbs v. Cruikshank*, L. R. 8 C. P. 454; *Slade's Case*, 4 Co. 91; *Thrustont v. Cralter*, 2 Bl. 827; *Phillips v. Berryman*, 3 Dougl. 286; *King v. Chase*, 15 N. H. 9; *Doty v. Brown*, 4 N. Y. 71; *Agnew v. McElroy*, 18 Miss. 552; *Young v. Black*, 7 Cranch. 565; *Pinney v. Barnes*, 17 Conn. 420; *Green v. Clark*, 5 Denio, 497; *Sergeant in re*, 17 Vt. 425; *Miller v. Manice*, 6 Hill. 114; *Eastman v. Cooper*, 15 Pick. 276; *Teal v. Woodward*, 3 Paige, 470; *Lynch v. Swanton*, 53 Me.

100; *Love v. Waltz*, 7 Cal. 259; *Greenleaf v. Luddington*, 15 Wis. 588; *Atchison v. Commissioners*, 12 Kas. 127; *Berry v. Lewis*, 19 Miss. 443; *Aspden v. Nixon*, 4 How. 493; *Bigelow v. Winsor*, 1 Gray. 299; *Finney v. Finney*, 1 P. & D. 453; *Ferrer's Case*, 6 Co. 7; *Hadley v. Green*, 2 Tyrw. 390; *Guardin v. Dean*, 49 Tex. 243; *Ramsay v. Herndon*, 1 McLean. 540; *Martin v. Kennedy*, 2 B. & P. 71; *Duncan v. Stokes*, 47 Ga. 595; *Outram v. Morewood*, 3 East, 346; *Bukhead v. Brown*, 5 Sandl. 431.

<sup>2</sup> *Goodenow v. Litchfield*, 59 Iowa, 226.

<sup>3</sup> *Tilley v. Bridges*, 105 Ill. 326; *State v. Boothe*, 68 Mo. 546; *Schrauth v. Bank*, 8 Daly, 106; *Challis v. Smith*, 25 Kas. 563; *Radford v. Folsom*, 3 Fed. R. 199; *Reynolds v. Babcock*, 60 Iowa, 289; *Heroman v. Louisiana*, 34 La. Ann. 805; *Price v. Dewey*, 6 Sawyer, 493; S. C., 11 Fed. Rep. 104; *Goodenow v. Litchfield*, 59 Iowa, 226; *Vallandigham v. Ryan*, 17 Ill. 25; *Carroll v. Hamilton*, 30 La. An. 520;

assumpsit for money had and received, the avails of certain goods, first came before the court upon a demurrer to a plea of a former judgment for the defendant in an action of trover for the same goods, and judgment was given for the plaintiff. The issues of fact were subsequently tried, and it appeared in evidence that in the suit in trover the defendant had a verdict on the merits, upon which judgment was perfected; and the court held it a bar to the action in assumpsit as being for the same cause. The court said that, as there was clearly a conversion before the action of trover, the only question must have been on the property; and in the action the same question arose; and the first action determined the goods not to be the plaintiff's.<sup>1</sup> So where the question of a *mistake is involved* in a bill in equity, and the question of *mistake is decided* against the complainant, the decree will be held binding and conclusive upon him in any subsequent suit seeking other relief on the same ground.<sup>2</sup> A matter or cause of action is *res judicata* when it is actually merged in a judgment, or the same point has already been decided between the same parties; and if, by law, a judgment could have been given for the plaintiff in a former suit, for precisely the same cause of action as that for which the present suit is brought, it has, within the rule, passed into judgment, and is *res judicata*. But in order to bar the second action the circumstances must be such that the plaintiff might have recovered in the first for the same cause alleged in the second.<sup>3</sup> It is not sufficient that the transactions involved in and giving rise to the two actions are the same; the causes of action must be identical to the extent that the same evidence will support both. The form of action may be different and the causes of action still the same; that is, the same evidence may be equally available to support either. A judgment for the defendant in an action of trover may bar an action of *indebitatus assumpsit* for the value of the same goods, but to constitute a bar

Ledoux v. Burton, 30 La. An. 576;  
Barkdue v. Hermig, 20 La. An. 618;  
Logan v. Herbert, 30 La. 727; R. R.  
Co. v. Schutte, 103 U. S. 118.

<sup>1</sup> Hitchen v. Campbell, 2 Wm. Bla.  
778; Sewell v. Scott, 35 La. An. 553.

<sup>2</sup> Tilley v. Bridges, 105 Ill. 336

<sup>3</sup> Rogers v. Ripley, 25 Wend. 432;

Briggs v. Wells, 12 Barb. 567; Burt  
v. Sternberg, 4 Cow. 579; Bank v.  
Bridges, 11 Rich. 87; Mann v. Rogers,  
36 Cal. 316; Bigelow v. Winsor, 1  
Gray, 299; Bagot v. Williams, 3 B. &  
C. 235; Nelson v. Couch, 15 C. B. N.  
S. 99; Stowell v. Chamberlain, 60 N.  
Y. 372

it must appear that the question of property was passed upon in the first action.

§ 99. Parties to a controversy cannot, after judgment, revive it in another court and cause, in order to raise again the questions already in issue and adjudicated. If an action be brought and the merits of the question be discussed between the parties and a final judgment obtained by either, the parties are concluded and cannot canvass the same question again in another action, although, perhaps some objection or argument might have been urged upon the first trial which would have led to a different judgment. In such a case the matter in dispute having passed in "*rem judicatum*," the former decision is conclusive between the parties if either attempts, by commencing another action to reopen the question.<sup>1</sup> A decision once made by the highest tribunal empowered to pass upon it, or a judgment rendered by a

<sup>1</sup> *Greathead v. Bromley*, 7 T. R. 456; *Bagot v. Williams*, 3 B. & C. 235; *Place v. Potts*, 5 H. L. Cas. 283; *Oxerton v. Harvey*, 9 C. B. 324; *Tommer v. White*, 1 H. L. Cas. 160; *Whittaker v. Branson*, 2 Paine C. C. 209; *Clark v. Young*, 1 Cranch, 181; *Grant v. Ramsey*, 7 Ohio S. 157; *People v. Cunningham*, 3 Park. C. R. 316; *Manly v. Kidd*, 23 Miss. 141; *Boston v. Haynes*, 33 Cal. 31; *Chamberlain v. Carlisle*, 26 N. H. 540; *Cleveland, &c. Co. v. Erie*, 1 Grant Cas. 212; *Parrish v. Ferris*, 2 Black, 606; *Bigelow v. Winsor*, 1 Gray, 229; *Nelson v. Couch*, 15 C. B. N. S. 99; *Barrs v. Jackson*, 1 Y. & C. 585; *Price v. Deway*, 6 Sawyer, 493; *State v. Boothe*, 68 Mo. 516; *Thompson v. Myrick*, 24 Minn. 4; *Davis v. Bedsole*, 69 Ala. 362; *Caldwell v. White*, 77 Mo. 471; *Santa Cruz v. Santa Clara*, 62 Cal. 140; *Reynolds v. Babcock*, 60 Iowa, 289; *Goodenow v. Litchfield*, 59 Iowa, 226; *Noyes v. Kern*, 94 Ill. 521; *Henderson v. Hill*, 64 Ga. 292; *Caldwell v. White*, 77 Mo. 471; *Wilson v. Boughton*, 50 Mo. 17; *Ashley v. Glasgow*, 7 Mo. 320; *Cald-*

*well v. Lockridge*, 9 Mo. 368; *Hill v. St. Louis*, 20 Mo. 58; *Smith v. Best*, 42 Mo. 185; *Gordner's Appeal*, 89 Pa. St. 528; *Morrison v. Clark*, 55 Tex. 437; *Montgomery v. Harrington*, 58 Cal. 270; *Morse v. Elms*, 31 Mass. 151; *Newby v. Caldwell*, 51 Iowa, 102; *Hudson v. Judge*, 42 Mich. 239; *Laurence v. Milwaukee*, 45 Wis. 306; *Lewis v. Boston*, 130 Mass. 339; *Norman v. Burns*, 67 Ala. 248; *Powers v. Bank*, 129 Mass. 44; *Steinbach v. Ins. Co.*, 77 N. Y. 198; *U. S. v. Ames*, 99 U. S. 35; *Mathews v. Green*, 12 Phila. 341; *Thompson v. Blanchard*, 2 Lea, 528; *Croft v. Johnson*, 8 Baxter, 390; *Johnson v. Staleup*, 4 Baxter, 283; *Bank v. Rude*, 23 Kans. 143; *Fraser v. Davis*, 15 S. C. 406; *Henderson v. Hill*, 64 Ga. 292; *Demarest v. Daig*, 32 N. Y. 281; *Cole v. Connelly*, 16 Ala. 271; *Hutchinson v. Deaning*, 20 Ala. 798; *Kingsland v. Spalding*, 3 Barb. 341; *Tyler v. Willis*, 35 Barb. 213; *Warwick v. Underwood*, 3 Head, 238; *Hyatt v. Bates*, 35 Barb. 308; *Harris v. Harris*, 36 Barb. 88; *Babcock v. Camp*, 12 Ohio St. 11.

court of competent jurisdiction, that is having jurisdiction of the parties or thing adjudicated upon, which is unreversed or unannulled, is conclusive upon the parties to the controversy and their privies, and they are forever afterwards estopped or barred from reviving it in any new proceeding, for the purpose of the same or any other question passed upon in the former action.<sup>1</sup> The matter in controversy, the cause of action, has become definitely settled by judicial decision; it is *res adjudicata*, and the judgment of the court imports absolute verity,<sup>2</sup> whatever the question involved, whether it be the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment, the rule of conclusiveness is the same. The controversy has been adjudicated, and once finally passed upon is never to be renewed.<sup>3</sup> Every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears; and this rule applies as well to every judgment or decree, rendered in the various stages of their proceedings from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record; which thenceforth proves itself, without referring to the evidence on which it has been adjudged.

<sup>1</sup> Walker v. Chase, 53 Me. 258; Housemire v. Moulton, 15 Ind. 367; Cincinnati, &c. R. R. Co. v. Wynn, 14 Ind. 385; Peterson v. Nehf, 80 Ill. 28; Jamaica, &c. Co. v. Chandler, 121 Mass. 1; Gray v. Stancel, 76 N. C. 369; Allis v. Davidson, 23 Minn. 442; Bettys v. Chicago, &c. R. R. Co., 43 Iowa, 602; U. S. v. Arredondo, 6 Pet. 729; Waugh v. Chauncey, 13 Cal. 12.

<sup>2</sup> Flynn v. Holmes, 8 Mich. 95; Thomas v. Malster, 14 Md. 382; Wyche v. Clapp, 43 Tex. 543; Malone's Appeal, 79 Pa. 481; Farley v. Budd, 14 Iowa, 289; Hubbard v. Fisher, 25 Vt. 539.

<sup>3</sup> Hudson v. Smith, 39 N. Y. Superior Ct. 452; Etheridge v. Osborn, 12 Wend. 399; Hays v. Reese, 34

Barb. 151; Hyatt v. Bates, 35 Barb. 308; Harris v. Harris, 36 Barb. 88; Young v. Black, 7 Cranch, 567; Chapman v. Smith, 16 How. 114; Wales v. Lyon, 2 Mich. 276; Prentiss v. Holbrook, 2 Mich. 372; Vankleck v. Eggleston, 7 Mich. 511; Newberry v. Trobridge, 13 Mich. 278; Crandall v. James, 6 R. I. 144; Babcock v. Camp, 12 Ohio S. 11; Warner v. Scott, 39 Pa. 274; Kerr v. Union Bank, 18 Md. 396; Eimer v. Richards, 25 Ill. 289; Wright v. Leclair, 3 Ia. 241; Whitaker v. Johnson Co., 12 Ia. 595; Peay v. Duncan, 20 Ark. 85; Maddox v. Graham, 2 Met. (Ky.) 56; George v. Gillespie, 1 Greene (Ia.) 421; Clark v. Sammons, 13 Ia. 368; Taylor v. Chambers, 1 Ia. 124; Skelding v. Whitney, 3 Wend. 154.

§ 100. This rule of conclusiveness, this doctrine of estoppel, is one of the most inflexible principles of law, and has its foundation in this fundamental principle, "*interest reipublice ut sit finis litium.*" When a cause of action is so far the same that a former judgment can be pleaded in bar, or when the matters in controversy in the suit can be shown by record evidence to have been examined and decided in another. There is every reason why that which has attained the highest degree of certainty known to the law, should not again be litigated between the same parties; for it concerns the peace and welfare of community that there should be an end to litigation. Justice requires that every cause should be once fairly tried, and the public tranquillity demands that having been once so fairly tried, all litigation of that question between those parties should be concluded forever. Were it otherwise there would be no security for any person and great injustice might be done under color and pretense of law.<sup>1</sup> To ascertain the grounds and motives which may have led to the final determination of a question once settled by the jurisdiction to which the law has referred it, would be extremely dangerous, and it is better for the general administration of justice, that one individual should be inconvenienced than that the whole system of jurisprudence be overthrown and endless uncertainty introduced.<sup>2</sup>

§ 101. The effect of a judgment does not depend upon the reason given for it, or upon the circumstances that any were or were not given.<sup>3</sup> If they were they may have covered portions of the controversy only, or they may have had such reference to facts peculiar to that case, that in any other controversy where the facts were somewhat similar and apparently resembling it in its legal bearings, serious doubts might arise whether it ought to fall within the same general principle. If one judgment is absolutely to conclude the parties to any similar controversy, we ought to know to a certainty almost that all the facts and ques-

<sup>1</sup> Schuman v. Weatherhead, 1 East, 541; San Francisco v. S. V. W. W., 39 Cal. 473; Crane v. Blum, 56 Tex. 325.  
<sup>2</sup> Reg. v. Yorkshire, 1 A. & E. N. S. 625; State v. Jumel, 30 La. Ann. 861; Hartley v. Gregory, 9 Neb. 279.

<sup>3</sup> Hill v. Bowman, 14 La. Ann. 445; Buckner v. Colcote, 28 Miss. 432; Palmer v. Yarrington, 1 Ohio S. 253; McDonough, Succession of, 24 La. Ann. 34; Plieque v. Perret, 19 La. Ann. 318.

tions of law upon which the former judgment was rendered was substantially the same in the other controversy.

§ 102. The essential conditions under which the plea of *res judicata* becomes applicable are the identity of the thing demanded, the identity of the cause of demand, and of the parties in the character in which they are litigants.<sup>1</sup> Experience has disclosed that for the security of rights and the preservation of the repose of society a limit must be imposed upon the facilities for litigation. For this purpose the presumption has been adopted that the thing adjudged by a court of competent jurisdiction, under definite conditions, shall be received in evidence as irrefragible truth. This presumption is a guarantee of the future efficacy and binding operation of the judgment. It presupposes that all the constituents of the judgment shall be preserved by the court which renders it, in an authentic and unmistakable form. In the courts upon the continent of Europe, and in the courts of chancery and admiralty in the United States and Great Britain, where the function of adjudication is performed entire by a tribunal composed of one or more judges, this has been done without much difficulty. The separate functions of the judge and jury in common law courts created a necessity for separating issues of law from issues of fact; and with the increase of commerce and civilization transactions have become more complicated and numerous, and law and fact have become more closely interwoven, so as to render their separation more embarrassing. The ancient system of pleading was more conclusive to the end of ascertaining the material issue between the parties, and the preservation in a permanent form of the evidence of the adjudication has been condemned as requiring unnecessary precision and subjecting parties to over technical rules, perplexity and expense. A system of general pleading has been

<sup>1</sup> *Cantrelle v. Roman, &c.* Cong., 16 La. Ann. 142; *Beuz v. Hines*, 3 Kas. 397; *McGee v. Overby*, 12 Ark. 164; *Trammell v. Thurmond*, 17 Ark. 203; *Griffin v. Seymour*, 15 Iowa, 30; *Peyton v. Enos*, 16 La. Ann. 135; *Boston v. Haynes*, 33 Cal. 81; *Beere v. Fleming*, 13 Irish C. L. 506; *Langmead v. Ma-*

*ple*, 18 C. B. N. S. 255; *Jones v. Lavender*, 55 Ga. 228; *Davenport v. Burnett*, 51 Ind. 329; *Blackwell v. Dibrell*, U. S. C. C. (Va.); *Buttrick v. Holden*, 8 Cush. 233; *Lawrence v. Vernon*, 3 Sumn. 22; *Butler v. Gan non*, 53 Md. 333.

extensively adopted in this country, which rendered it unnecessary that as between parties and privies the record should show that the question upon which the right of the plaintiff to recover on the validity of the defense depended for it to operate conclusively, but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material and was in fact contested, and that it was referred to the decision of the jury.<sup>1</sup> Thus, a record of a former suit between the same parties was admitted in evidence, in which judgment was rendered for the defendant, supported by parol proof that the cause of action in the two suits was the same.<sup>2</sup> The court said the controversy had passed *rem judicatum*; and the identity of the causes of action being once established the law would not suffer them again to be drawn into question, and this seems to be the settled rule in this country; and the supreme court decided that the record of a former suit between the parties, in which the declaration consisted of a special count and the common money counts, and where there was a general verdict on the entire declaration, it cannot be given in evidence as an estoppel in a second suit founded on the special count, for the verdict may have been rendered on the common counts, and there is no variation from this rule, although after a verdict is rendered the court directs a judgment to be entered for the plaintiff on the first count in the declaration, it being the special count.<sup>3</sup>

§ 103. The estoppel of a judgment is limited in all cases to the points actually decided, but will not be less an estoppel to those points decided because it fails to go further, and hence while a judgment may be *evidence* and *conclusive evidence*, it may still not be available as an estoppel to a second action. Thus in an action to recover on a bond to indemnify against outstanding debts of a partnership, the defendant pleaded that there had

<sup>1</sup> Young v. Black, 7 Cranch, 565; bee, 3 Cow. 120; Miles v. Caldwell, 2 Packet Co. v. Sickles, 24 How. 333; Wall. 34; Aurora City v. West, 7 Wood v. Jackson, 8 Wend. 9; Eastman v. Cooper, 15 Pick. 276; Burt v. Sternberg, 4 Cow. 559; Doty v. Brown, 4 N. Y. 71; Lawrence v. Hunt, 10 Wend. 80; Gardner v. Buck-

<sup>2</sup> Young v. Black, 7 Cranch, 565  
<sup>3</sup> Wash. Steam Packet Co. v. Sickles, 24 How. 333.

been a former recovery on the same bond, between the same parties; but it appearing that the second suit was for breaches of the bond not embraced in the first suit, the court said (1) that several suits on the same bond for different breaches could be maintained; (2) that the judgment in the former suit was not for the *penalty* of the bond, but merely the recovery of damages for the breaches thereof, which constituted no defense to the second action, which was for different breaches of the bond. The court say: The authorities are clear, that the judgment pleaded as a former recovery must be for the same cause of action; although it will be presumed that the plaintiff recovered *all* that he could then recover in that action. The principle of *res adjudicata* operates as a bar to a second suit, when it is shown that the former recovery was between the same parties, or their privies, and the point in controversy the same in both cases, and determined upon the merits.<sup>1</sup> But the former judgment constitutes no defense, if it be shown to have related to a different breach of the same contract.<sup>2</sup> Nor will such former judgment be a bar, if the action failed because prematurely brought.<sup>3</sup>

§ 10±. To make a former judgment conclusive between the parties in another suit, in relation to the same matter, it is necessary that the former suit should have been between the same parties. But the fact that there were other defendants in the former suit, who are also bound by the decision, and estopped from controverting the same fact, does not render the former decision any the less conclusive against any one of the defendants therein. In order to support the plea, it is necessary to show that the proceedings in which the plaintiffs were alleged to have failed were taken for the same purpose as the suit in which the plea was filed; for the issue might have been the same, while the object was different; and the circumstance that the matter had been tried as a matter of evidence could not be conclusive; the defendant must show that the subject matter was the same, that the right came in question before a court of competent jurisdic-

<sup>1</sup> Hughes v. United States, 4 Wall. 614; Florence v. Drayson, 1 C. B. 232, Todd v. Steward, 9 Q. B. 759; (N. S.) 584; Butler v. Wright, 2 Bagot v. Williams, 3 B. & Cr. 235. Wend. 369.

Phillips v. Bernick, 16 Johns. 137.

<sup>2</sup> Palmer v. Temple, 9 Ad. & Ell.

<sup>3</sup> Bristowe v. Fairclough, 1 M. & 531, Orendorf v. Utz, 48 Md. 298.

tion, and that the result was conclusive, so as to bind the judgment of every other court. This is in accordance with the rule of the civil law, in which, according to Voet, the *exceptio litis finite* could only be allowed *si lis terminata de iure movetur inter eandem personam, de eadem re et ex eadem petendi causa*. The allowance of the plea is based on the maxim, *Etjudit rei obliet ut sit finis litium*; and the test question is, whether the party had in the former suit full opportunity to litigate the very subject matter of the present one. A plea of former action depending for the same matter will not be good, unless the former action were of the same nature and effect as the latter.<sup>1</sup>

§ 105. The conclusive effect of judgments *in personam* depends upon the fact of whether the same point was in issue in the former action. The rule as laid down in the Duchess of Kingston's case is the well settled rule of all countries, that judgments of courts of concurrent jurisdiction are not admissible in a subsequent suit, unless they are not only between the same parties, but also upon the same matters coming in question, and directly upon the point.<sup>2</sup> "A judgment estops the parties only as to the grounds covered by it and the facts necessary to uphold it. Parties are not allowed to prove what is inconsistent with its rectitude and justice, for while it stands unreversed it is final as to the points decided, but not in respect to matters which the record itself shows were not in question, and therefore when a cause has gone off for some defect, which precluded an inquiry into its merits, the judgment is usually no bar to a second action."<sup>3</sup> Thus, where in an action against a married woman for legal services rendered, the complaint did not aver that the services were ren-

<sup>1</sup> Dows v. McMichael, 6 Paige, 139; Behrens v. Sieveking, 2 M. & C. 581; Law v. Rigby, 4 Bro. C.C. 60; Davenport v. Barnett, 51 Ind. 329, Norris v. Ins. Co., 51 Mich. 621; Carroll v. Hamilton, 30 La. Ann. 520; R. R. Co. v. Schutte, 103 U. S. 118; Strong v. Grant, 2 Mackey, 218.

<sup>2</sup> Hopkins v. Lee, 6 Wheat. 109; Harvey v. Richards, 2 Gall. 216; Minor v. Walter, 17 Mass. 237; Bank v. Beverly, 1 How. 134; Thompson

v. Roberts, 24 How. 293; Parish v. Ferris, 2 Black, 606; Meerer v. Sel-den, 1 How. 37; Davis v. Murphy, 2 Rich. 560; Riche's Case, 3 Leon. 52; Henry v. Davis, 13 W. Va. 230.

<sup>3</sup> Houston v. Musgrove, 35 Tex. 594; Wells v. Moore, 49 Mo. 229; Bell v. Hoagland, 15 Miss. 360; Colwell v. Bleakley, 1 Abb. App. Dec. 400; Witcher v. Oldham, 4 Smed, 220.

dered on the faith and credit of, and for the benefit of her separate estate, and a final judgment was entered for the defendant on a demurrer thereto; such judgment is not a bar to a subsequent suit for the same services in which the complaint contains such averments. To make such a demurrer a bar it must go to the merits of the action.<sup>1</sup> So a reversal of a judgment proves nothing but its own correctness, and it only nullifies what has been done, and leaves the parties in the same situation as to their rights and remedies, in regard to the subject matter in litigation, as if no judgment had been rendered.<sup>2</sup> It destroys the estoppel.

§ 106. Where a cause of action is the same in two suits, a prior judgment in one will be a bar to the other. But where they are different, though the point in controversy is the same, the prior judgment is no bar to the subsequent action, but the judgment is evidence to prove such point. While a prior judgment may be no bar, strictly and technically speaking, where the cause of both objects are not identical, it does not follow that either party in the subsequent action can be allowed to contradict what was expressly adjudicated in the first, and in this country the principle is well settled that the judgment of a court of competent jurisdiction, directly upon a particular point, is as between the parties conclusive in relation to such point, though the subject-matter and object of the two suits may be different, and yet a judgment may not only be *evidence* but *conclusive evidence*, and still no bar to a second action.<sup>3</sup>

<sup>1</sup> Terry v. Hammond, 47 Cal. 32.

<sup>2</sup> French v. Edwards, 4 Sawyer, 125; Taylor v. Smith, 4 Ga. 133; Wood v. Jackson, 8 Wend. 9; Smith v. Frankfield, 77 N. Y. 414, Fries v. R. R. Co., 98 Pa. 142; Powell v. Rogers, 105 Ill. 318; Delannay v. Burnett, 8 Gill, 454; R. R. Co. v. Lee, 87 Ill. 458. (See Mangels v. Mangels, 6 Mo. App. 481, where it is held that the reversal of a decree of divorce does not necessarily reverse a decree for alimony, though both are part of one entry in the trial court.)

<sup>3</sup> Betts v. Starr, 5 Conn. 553;

Wright v. Dekline, 1 Peters C. C. 129; Starkie v. Woodward, 1 N. & McC. 329; Canan v. Turnpike Co., 1 Conn. 1; Cist v. Ziegler, 16 S. & R. 282, Gardner v. Buckbee, 3 Cow. 120; Wright v. Butler, 4 Wend. 284; Spencer v. Dearth, 43 Vt. 98; Davenport v. R. R. Co., 38 Iowa, 633; Boyd v. State, 53 Ala. 615; Davis v. Eastman, 1 Allen, 422; Goundie v. Northampton, &c. Co., 7 Pa. 233; Maple v. Beach, 43 Ind. 51; Stowell v. Chamberlain, 3 T. & C. 314; R. R. Co. v. Daniel, 20 Gratt. 344.

§ 107. But when the same matter is directly in question in another suit, and the judgment of the former suit is directly in point, *it will be as a plea, a bar, as evidence, conclusive.*<sup>1</sup> This is the rule of every system of jurisprudence, not only from its obvious fitness and justness, but if it were otherwise, there never could be an end to litigation; and it is not only applicable to courts of concurrent jurisdiction in England and America, but is applicable to orphans' courts in Pennsylvania; to a discharge under the insolvent laws; to a decision of a court of probate, though admitted to be erroneous; to a decree of the county court pursuant to the statute; to a decision of a court of common pleas upon a complaint made pursuant to statute for overflowing lands; to a decree of a county court awarding money to claimants from the sale of lands by the sheriff, though the decree was made upon a mistaken notion of law, and there was no remedy by writ of error; to a record of the forfeiture of a recognizance, where debt was brought upon such recognizance; to decrees of courts of equity; to sentences of courts of admiralty and of ecclesiastical tribunals; the judgment of a court in a naturalization case;<sup>2</sup> and, in fact, to every court which has proper cognizance of the subject-matter so far as they profess to decide the subject-matter in dispute.

§ 108. The finality and inviolability of judgments of a court of competent jurisdiction, not assailed on error or appeal, rests on an inflexible and conservative principle of law. The judgment between the same parties, or their privies, is conclusive of the matter directly in question. It is beyond question, it is final and absolute, however erroneous, or whatever of injustice it may work; it is a conclusive determination of the particular controversy.<sup>3</sup> And in this there is no difference between a verdict and

<sup>1</sup> *Lindsey v. Danville*, 41 Vt. 114; *Cannon v. Brune*, 45 Ala. 232; *Geary v. Simmons*, 39 Cal. 234; *Lentz v. Wallace*, 17 Pa. 412; *Clark v. Bryan*, 6 Md. 171; *Jones v. Lavender*, 55 Ga. 228; *Bissick v. McKenzie*, 1 Dily. 265; *Hopkins v. Lee*, 6 Wheat. 109; *R. R. Co. v. Griffith*, 76 Va. 913; *Goodnow v. Litchfield*, 59 Iowa, 223; *Reynolds v. Babcock*, 60 Iowa, 259.

<sup>2</sup> *State v. McDonald*, 21 Minn. 48; *State v. Penny*, 19 Ark. 621; *People v. McGowan*, 77 Ill. 644; *People v. Walsh*, 9 Abb. N. Cas. 465.

<sup>3</sup> *Aurora City v. West*, 7 Wall. 82; *Allie v. Schmitz*, 17 Wis. 169; *Edwards v. Stewart*, 15 Barb. 67; *Walker v. Mitchell*, 18 B. Mon. 541; *Hopkins v. Lee*, 6 Wheat. 109; *Langdon v. Raiford*, 20 Ala. 532; *Marriott v.*

judgment in a court of common law and a decree of a court of equity. Both stand on the same footing. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because, without it, an end could never be put to litigation.

§ 109. Whenever it appears that the same question has been directly decided by a court of competent jurisdiction between the same parties it should be deemed *res adjudicata*. There is no need that both courts should have been courts of law or both courts of equity, or that all of the parties should have been the same in both suits.<sup>1</sup> Thus, defendant as sheriff, by virtue of attachments against A. and S. levied on a stock of goods which

Hampton, 7 T. R. 269; Aslin v. Parkin, 2 Burr. 665; Leguen v. Gouverneur, 1 Johns. Cas. 436; Edgell v. Sigerson, 26 Mo. 583; Eimer v. Richards, 25 Ill. 289; Hanley v. Foley, 18 B. Mon. 519; Heath v. Frackelton, 20 Wis. 320; Hendrickson v. Norcross, 17 N. J. Eq. 417; Chase's Case, 1 Bland, 206; Baldwin v. McCrea, 38 Ga. 650; Jordan v. Faircloth, 34 Ga. 47; Gardner v. Buckbee, 3 Cow. 120; French v. Howard, 14 Ind. 455; Sanders v. Gatewood, 5 J. J. Marsh. 327; R. R. Co. v. R. R. Co., 20 Wall. 137; Trustees v. Kellar, 1 Ala. 406; Thomasson v. Odom, 31 Ala. 108; Beloit v. Morgan, 7 Wall. 619; Babcock v. Camp, 12 Ohio S. 11; Goodrich v. City, 5 Wall. 566; R. R. Co. v. Griffith, 76 Va. 913; Garwood v. Garwood, 29 Cal. 514; Doyle v. Reilly, 18 Iowa, 108; Allen v. Hall, 1 A. K. Marsh. 525; Demarest v. Daig, 32 N. Y. 281; Smith v. Way, 9 Allen, 472; Sergeant v. Ewing, 36 Pa. 156; Cabot v. Washington, 41 Vt. 168; Bohe v. Stickney, 36 Ala. 482; Stewart v. Dent, 24 Mo. 111; Shuttleworth v. Hughey, 9 Rich. 387; Ballard v. Appelton, 26 Wis. 67; Overton v. Harvey, 9 C. B. 324; Todd v. Stuart, 9 Q. B. 759; Trotter v. Blake, 2 Mod.

231; Rake v. Pope, 7 Ala. 161; Manchester Mills *in re*, Doug. 222; Boyd v. State, 53 Ala. 613; Lynch v. Swanton, 53 Me. 100; Bunker v. Tufts, 57 Me. 417; Slade v. Slade, 58 Me. 157; Atkinson v. White, 60 Me. 396; Hill v. Morse, 61 Me. 541; P. & A. R. Co. v. Erie, 1 Grant Cas. 212; Prescott v. Lewis, 12 La. Ann. 197; Denny v. Reynolds, 24 Ind. 248; People v. San Francisco, 27 Cal. 655; Johnson v. Kirkhoff, 35 Mo. 233; Town v. Lanphear, 34 Vt. 365; Ellis v. Clark, 19 Ark. 420; Mervine v. Parker, 18 Ala. 241; Roberts v. Heim, 27 Ala. 678; O'Neal v. Brown, 21 Ala. 482; Derrett v. Alexander, 25 Ala. 265; Tarleton v. Johnston, 25 Ala. 300; Richards v. Jones, 16 Mo. 177; Leavitt v. Wolcott, 95 N. Y. 217; People v. Hall, 80 N. Y. 127.

<sup>1</sup> U. S. v. Ames, 99 U. S. 35; Putnam v. Clark, 34 N. J. E. 532; Price v. Dewey, 6 Sawy. 493; Norwood v. Kirby, 70 Ala. 397; Caldwell v. White, 77 Mo. 471; Western Co. v. Coal Co., 10 W. Va. 250; Smith v. Hemstreet, 54 N. Y. 644; Blair v. Bartlett, 75 N. Y. 150; Langmead v. Maple, 18 C. B. N. S. 255; Hughes v. Blake, 6 Wheat. 453; Powers v. Bank, 129 Mass. 44.

they had sold to L. and he to plaintiff. An assignee in bankruptcy of V. and S. brought an action in the United States District Court, making the parties hereto the bankrupts, L., and the attachment creditor defendants, claiming title to the property, and that the sale to the plaintiff was fraudulent and void. Defendant sold the property, and by order of said court deposited the avails. The decree in said action awarded the fund to the assignee. This action was brought to recover the property.

Held, 1. That said decree was properly pleaded in bar and was *res adjudicata* between the parties as to plaintiff's title.

2. That although the decree, by its terms, simply disposed of the fund, the title of plaintiff to the property was necessarily involved, as the assignee could only have recovered by establishing his own title against all the other parties, and he had a right to accept the fund instead of the property, or its value; that plaintiff could not recover in this action without having a general or special property in the goods.

3. That a plea of property in a third person was good.

4. That the estoppel was effective, although the decree was in a court of equity and the parties hereto were both defendants, and although the sheriff had not accounted for all the goods.<sup>1</sup>

§ 110. The solemn decisions or judgments of tribunals of justice made in the exercise of their rightful jurisdiction, where the parties have had an opportunity of being heard or making a defense, and upon due deliberation, are in the law conclusive upon all points directly involved. The fundamental principle, *interest reipublice ut sit finis litium*, being regarded as governing this branch of the law; and it makes no difference whether the courts rendering the judgments be of limited or general jurisdiction, whether they are courts of record or not, as long as they act within their jurisdiction or sphere assigned to them, their adjudications are conclusive between the same parties and their privies upon the same subject matter;<sup>2</sup> and in conclusion it must

<sup>1</sup> *Tuska v. O'Brien*, 68 N. Y. 416.

<sup>2</sup> *Killeffer v. Herr*, 17 S. & R. 319; *Townsend v. Townsend*, 5 Harr. 20; *Pierson v. Catlin*, 8 Vt. 77; *Davis v. Murphy*, 2 Rich. 560; *Foster v. Wells*, 4 Tex. 101; *Society, &c. v. Hartland*,

2 Paine C. C. 536; *Bailey v. Davis*, 1 Pick. 206; *Perkins v. Fairfield*, 11 Mass. 227; *Gerrish v. Bearce*, 10 Mass. 193; *Cushing v. Hackett*, 10 Mass. 164; *Cook v. Allen*, 2 Mass. 462; *Edy v. Williams*, 1 Root, 185; *Shadburn*

be remembered that this conclusive effect is only applicable where the tribunal rendering the judgment had jurisdiction over the parties or subject-matter in controversy. When a court transcends the limits prescribed for it by law, and assumes to act where it has no jurisdiction, its adjudications will be utterly void and of no effect either as an estoppel or otherwise. Thus, judgment of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.<sup>1</sup> Thus, in proceedings before a Federal court in a confiscation case, monition and notice were issued and published, but the appearance of the owner, for which they called, when made, was stricken out, his right to appear being denied by the court. The subsequent sentence of confiscation of his property was as inoperative upon his rights as though no monition or service had ever been issued. The legal effect of striking out his appearance was to recall the monition and notice as to him.

§ 111. The estoppel of a judgment covers the whole matter in dispute in the cause in which it is rendered, and to every point decided between the parties, in the course of the proceedings which led to the judgment.<sup>2</sup> The judgment itself operates as a bar, and the decision of a particular issue as an estoppel,<sup>3</sup> but their conclusive effect is the same and depends upon the principle of *interest reipublice ut sit finis litum*.<sup>4</sup> In order to make a judgment effectual as an estoppel, the cause of action

v. Jennings, 1 A. K. Marsh. 179; Denison v. Hyde, 6 Conn. 508; Edwards v. McConnell, Cooke, 305; Bank v. Beverly, 1 How. 134; Washington B. Co. v. Stewart, 3 How. 413; Hall v. Dana, 2 Aik. 381; Crandell v. Gallup, 13 Conn. 365; Breckenridge v. Ormsby, 1 J. J. Marsh. 236.

<sup>1</sup> Windsor v. McVeigh, 93 U. S. 274; S. C., 11 Wall. 267.

<sup>2</sup> Allison's Case, L. R. 9 Ch. 25; S. C., 43 L. J. C. 11; Wildes v. Russell, L. R. 1 C. P. 722; Huffer v. Allen, L. R. 2 Exch. 15; N. Y., &c. Co. v. Kyle, 5 Bosw. 587; Fluker v. Herbert, 27 La. Ann. 284; Poorman

v. Mitchell, 48 Mo. 45; Craig v. Ward, 1 Abb. App. 454; Land v. Keim, 52 Miss. 341; Roberts v. Heine, 27 Ala. 678; Hawley v. Simmons, Ill.

<sup>3</sup> Parker v. Standish, 3 Pick. 288.

<sup>4</sup> Young v. Black, 7 Cranch, 565; Denver v. Lobenstein, 3 Col. 216; Croft v. Johnson, 8 Baxt. 390; R. R. Co. App., 1 Pennypacker, 360; Frauenthal's App., 100 Pa. St. 290; U. S. v. Throckmorton, 93 U. S. 61; Ferrer's Case, 5 Co. 7; Higgins' Case, 6 Co. 46; Overton v. Harvey, 9 C. B. 324; Tredegar v. Windus, L. R. 19 Eq. 607; Lockyer v. Ferryman, L. R. 2 App. Cas. 519.

must be substantially the same; it must be sustained by the same evidence, although the form of the action may be different.<sup>1</sup> But the estoppel of an issue on a particular point, or of the judgment itself as to the point which it decides, will be conclusive as to the points in any subsequent proceeding, whether founded on the same or a different cause of action.<sup>2</sup> At the old practice the course of pleading tended constantly to narrow the controversy between the parties to a single point of fact or law, which was exactly defined on the record and could not be subsequently questioned. But the course of modern practice requires little certainty of allegation or denial on the part of either plaintiff or defendant, and renders it difficult to ascertain the subject matter of the controversy, and still more the precise points on which it was decided, by a mere inspection of the record.<sup>3</sup> So that the nature of the question in dispute between the parties may be shown by parol evidence, as a matter of public policy, and thus brought within the estoppel of the judgment,<sup>4</sup> and this may be

<sup>1</sup> *Miller v. Manice*, 6 Hill, 114; *Eastman v. Cooper*, 15 Pick. 276; *Teal v. Woodward*, 3 Paige, 470; *Lynch v. Swanton*, 53 Me. 100; *Love v. Waltz*, 7 Cal. 250; *Greenleaf v. Ludington*, 15 Wis. 588; *Hutchinson v. Commis.*, 12 Kas. 127; *Perry v. Lewis*, 49 Miss. 413; *Aspen v. Nixon*, 4 How. 496; *Bigelow v. Winsor*, 1 Gray, 299; *Douglass v. Ireland*, 73 N. Y. 107; *Stowell v. Chamberlain*, 60 N. Y. 272; *Phillips v. Bernick*, 16 Johns. 137; *People v. Johnson*, 38 N. Y. 65; *Barwell v. Night*, 51 Barb. 267; *Royce v. Durt*, 42 Barb. 663; *Slawson v. Engelhart*, 34 Barb. 202; *Many v. Harrison*, 2 Johns. 30; *Steinbach v. Ins. Co.*, 77 N. Y. 498.

*Gardner v. Buckbee*, 3 Cow. 120; *Parkins v. Walker*, 19 Vt. 141; *Hayes v. Gurdykunst*, 11 Pa. St. 221; *Lawrence v. Vernon*, 3 Summ. 20; *White v. Courtsworth*, 6 N. Y. 137; *Doty v. Brown*, 4 N. Y. 71; *Peterson v. Lathrop*, 34 Pa. 223; *Roberts v. Heine*, 27 Ala. 678; *Chamberlain v. Gaillard*, 26 Ala. 504; *Dubois v. Phil. &c. Co.*, 5

*Fish. Pat. Cas.* 208; *Barker v. Cleveland*, 19 Mich. 230; *Lindsey v. Danville*, 46 Vt. 141; *Bissick v. McKensie*, 4 Daly, 265; *Spencer v. Deanth*, 43 Vt. 98; *Betts v. Starr*, 5 Conn. 550; *Williams v. Fitzhugh*, 44 Barb. 321; *Walker v. Chase*, 53 Me. 258; *McDonough, Succession of*, 14 La. Ann. 33; *Miller v. McManus*, 57 Ill. 126; *Bouchard v. Diaz*, 3 Denio, 238; *Babcock v. Camp*, 12 Ohio S. 11; *Tucker v. Rohrback*, 13 Mich. 75.

<sup>2</sup> *Sawyer v. Woodbury*, 7 Gray, 499; *Babcock v. Camp*, 12 Ohio S. 11.

<sup>3</sup> *Young v. Black*, 7 Cranch, 569; *Lawrence v. Hunt*, 10 Wend. 89; *Young v. Rummell*, 2 Hill, 478; *McKnight v. Dunlap*, 4 Barb. 36; *Beebee v. Elliott*, 4 Barb. 457; *Biggs v. Wells*, 12 Barb. 567; *Clapman v. Smith*, 16 How. 114; *Rogers v. Libby*, 35 Me. 250; *Baker v. Ravis*, 7 Ill. 355; *Chamberlain v. Galliard*, 26 Ala. 504; *Babcock v. Camp*, 12 Ohio S. 11; *Dement v. Lyford*, 27 N. H. 311; *Wash. Packet Co. v. Sickles*, 5 Wall. 580; *Smith v. Smith*, 79 N. C. 634;

done in regard to the particular points on which the decision of the question depended, whenever the circumstances are such that they cannot be ascertained with certainty.<sup>1</sup> To ascertain whether a former judgment is a bar to future litigation, the criterion is, was the same vital matter directly in issue and determined. A judgment of a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, the whole subject matter of the action will be at large and open to a new contention; unless this uncertainty be removed by extrinsic evidence, showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible. So that when the grounds of the judgment appear by the record they must be proved by the record alone. Where the record fails to show the ground upon which judgment therein was rendered, a resort may be had to the next best evidence.

Kiern v. Ainsworth, 95 Pa. S. 310; Felton v. Smith, 8 Ind. 149; Hickerson v. Mexico, 58 Mo. 61; McDermott v. Hoffman, 70 Pa. St. 31; Hughes v. Jones, 2 Md. Ch. 178; Walker v. Chase, 53 Me. 258; Bougher v. Scobey, 21 Ind. 365; Hood v. Hood, 110 Mass. 463; Lander v. Arno, 65 Me. 26; Sturdevant v. Randall, 53 Me. 149; Stricks v. Dyer, 39 Md. 424; Russell v. Place, 94 U. S. 606; Christian v. Hanman, 29 Gratt. 494; Evans v. Clapp, 123 Mass. 165; Stapleton v. King, 40 Iowa, 278; Gardner v. Buckbee, 3 Cow. 120; Ciuni v. Boss, 48 Iowa, 433; White v. Chase, 128 Mass. 158; 21 A. L. J. 135; Supples v. Cannon, 44 Conn. 424; Davis v. Brown, 94 U. S. 423.

Whitehurst v. Rogers, 38 Md. 503; Christian v. Pierce, 7 Ga. 434; McDermott v. Hoffman, 70 Pa. 31; Bynton v. Morrill, 111 Mass. 415;

Hood v. Hood, 110 Mass. 463; Merriam v. Whittemore, 5 Gray, 316; Perkins v. Walker, 19 Vt. 144; Lander v. Arno, 65 Me. 26; Bell v. Raymond, 18 Conn. 91; Walker v. Chase, 53 Me. 258; Hughes v. Jones, 2 Md. Ch. 178; Frantz v. Ireland, 4 Lans. 278; Edgell v. Sigerson, 26 Mo. 583; Hickerson v. Mexico, 58 Mo. 61; Chase v. Walker, 26 Me. 555; Winich v. Howard, 14 Ind. 455; Treadwell v. Stebbins, 6 Bosw. 568; George v. Gillespie, 1 Iowa, 421; Gardner v. Buckbee, 3 Cow. 120; Barber v. Elliott, 4 Barb. 474; Small v. Haskins, 26 Vt. 209; Outram v. Morewood, 3 East, 353; Burt v. Sternbergh, 4 Cow. 559; Sawyer v. Woodbury, 7 Gray, 429; Wright v. Butler, 6 Wend. 289; Wood v. Jackson, 3 Wend. 27; Barrs v. Jackson, 1 Y. & C. 585; Gardner v. Raisbeck, 28 N. J. Eq. 71.

As for example : A. gave his promissory note to B. and conveyed to him a parcel of land as security for the payment of the same, taking B.'s agreement to re-convey the land when the note should be paid ; B. conveyed the land to C. ; afterwards, in a real action, A. recovered the land of C. upon the ground, either that the deed from A. to B. was never delivered to B., or that it was obtained from A. by duress ; the administrator of B. now sues A. upon the note. *Held*, that the judgment in the former action is not *per se*, a bar to the present suit ; also, that the former judgment can be made available, as a defense to this suit, by showing such an inseparableness of connection in the parts of the transaction, that the note could not have been delivered if the deed was not, and that the note must have been obtained by duress if the deed was ; provided it appears that the plaintiff's intestate actually defended the former action or that he stood in a relation to it giving him the legal right to do so. Further, that oral evidence may be received to prove any facts which go to establish such a defense, so far as such facts do not appear of record, either in support of a plea in bar or under the general issue.<sup>1</sup>

§ 112. It is often the case that questions of constitutional law are decided in a private litigation in which the parties to the suit and all others, who, after the litigation has ended, acquire right under them in the subject-matter of the controversy, are absolutely and forever estopped from renewing the question in respect to the matter then involved. So inflexible is this rule, that if another tribunal were to hold the judgment in that particular case erroneous, the old controversy could not be reopened in order that the final conclusion might be applied thereto.<sup>2</sup> As

<sup>1</sup> Lander v. Arno, 65 Me. 26.

<sup>2</sup> Van Kleeck v. Eggleston, 7 Mich. 511; Newbury v. Towbridge, 13 Mich. 263; Crandall v. James, 6 R. I. 144; Babcock v. Camp, 12 Ohio S. 11; Warner v. Scott, 39 Penn. St. 274; Kerr v. Union Bank, 18 Md. 396; Elmier v. Richards, 25 Ill. 289; Wright v. Leclair, 3 Iowa, 241; Whittaker v. Conly, 12 Iowa, 595; Maddox v. Graham, 2 Met. (Ky.) 56; Clark v. Sammons, 12 Iowa, 368; Young v. Black,

7 Cranch, 567; Chapman v. Smith, 16 How. 114; Peay v. Dunkin, 20 Ark. 85; Hyatt v. Bates, 35 Barb. 308; Harris v. Harris, 36 Barb. 88; McLean v. Huzarain, 13 John. 184; Morgan v. Plumb, 9 Wend. 287; Wilder v. Case, 16 Wend. 583; Baker v. Raul, 13 Barb. 152; Kelley v. Pike, 5 Cush. 484; Hart v. Jewell, 11 Ia. 276; Colburn v. Woodworth, 31 Barb. 284; Skildin v. Herrick, 3 Wend. 154; Brockway v. Kinney, 2 John. 210; Platner v. Best,

important principles of constitutional law may be disposed of in private actions, when private persons and their counsel alone are heard, it is of some importance to know to what extent other persons as well as the community at large may be affected by the decision. It will be found that the fundamental principle of law, *res inter alios acta alteri nocere non debet* applies, and a judicial decision has no such force of absolute conclusiveness as to other parties as it possesses between the parties to the controversy in which the decision has been made, and those who have succeeded to their rights. A stranger to a judgment cannot avail himself thereof by a plea of *res adjudicata*, nor as evidence upon the trial, in a suit between him and one of the parties thereto.<sup>1</sup> If strangers who have no interest in that subject-matter are to be in like manner concluded, because their controversies are supposed to involve the same question of law, we shall not only be forced into a series of endless inquiries, often resulting in little satisfaction, in order to ascertain whether the question is the same, but we shall also be met by the query, whether we are not concluding parties by decisions which others have obtained in fictitious controversies and by collusion, or have suffered to pass without sufficient consideration and discussion, and which might perhaps have been given otherwise had other parties an opportunity of being heard. To illustrate this doctrine: a decree of distribution determined that a fund in the hands of a receiver belonged to certain intervening claimants; from this decree an appeal was taken to the Supreme Court of the United States, where it was affirmed, and a mandate issued to the court below to execute the decree. Pending the appeal, other parties, strangers to the proceedings, applied to the court for an order restraining the distribution of the fund as decreed, and for an application of the fund to the satisfaction of their claims. The court below, upon receiving the mandate of the Supreme Court, refused to enforce it until the rights of the last-mentioned parties were adjudicated. The judgment creditors then sought by mandamus to compel the

11 John. 530; Phillips v. Berrick, 16 John. 136; Bobe v. Stickney, 36 Ala. 482; Mervine v. Parker, 18 Ala. 241, Roberts v. Heim, 27 Ala. 678; Derrett v. Alexander, 25 Ala. 265; Tarleton v. Johnston, 25 Ala. 300, Langdon v

Raiford, 20 Ala. 532; Rake v. Pope, 7 Ala. 161; Trustees v. Kellar, 1 Ala. 406; Thomasson v. Odom, 31 Ala. 168, O'Neal v. Brown, 21 Ala. 482.

<sup>1</sup> Henry v. Woods, 77 Mo. 271.

inferior court to execute the decree, on the ground that the matter having been adjudicated was conclusive as to the parties entitled to the fund, and that after the judgment of affirmance there could be no alteration by new pleadings or evidence, but that the decree must be executed in the exact manner in which it is affirmed.<sup>1</sup>

Judge Field, in delivering the opinion of the court, said: "None of the cases cited suggest even the proposition that the judgment or decree affirmed concludes the rights of third parties not before the court, or in any respect affects their rights. It would have been against all principle and all reason to have asserted any thing of the kind. There is a class of cases affecting the personal status of parties in which a judgment necessarily binds the whole world, but it is not of these we are speaking. we refer to judgments at law or decrees in chancery affecting the rights of parties to property. They bind only the parties before the court and those in privity with them. The decree did not acquire any additional efficacy by being affirmed as an adjudication upon the rights of the parties between themselves—it had the same operation before as after affirmance. The decree in that case determined that the complainants and intervening claimants were entitled to the fund in the hands of the receiver as against their debtor. It did not determine, and could not determine, that F. had not equal or greater claims to the fund than either of the parties to the decree. F. had, therefore, the same right to proceed by any appropriate remedy, if there be one, to assert any claims or equity to the fund which he possessed, as he might have done if no such suit as that had ever been commenced or carried to final decree. And in the prosecution of his suit he was entitled, upon a proper showing, to all the remedies which a court usually exercises to prevent the relief sought from being defeated. The general doctrine is, that where there is a fund in court to be distributed among different claimants, a decree of distribution will not preclude a claimant not embraced in it from asserting his right to the fund."<sup>2</sup>

<sup>1</sup> Ogden v. Bowen, 5 Ill. 301; Abrams v. Lee, 14 Ill. 167; Chickering v. Failes, 29 Ill. 302; Biscoe v. Tucker, 14 Ark. 515, Miner v. Mebberry, 7 Wis. 100; Young v. Frost, 1 Md. Ch. 377; Cameron v. McRoberts,

3 Wheat. 591; Brocket v. Brocket, 2 How. 238; McMicken v. Perrin, 18 How. 507.

<sup>2</sup> Howard *in re*, 9 Wall. 128; Gillespie v. Alexander, 3 Russ. 113; Williams v. Gibbs, 17 How. 257.

§ 113. All judgments are supposed to apply the existing law to the facts of the case; and the reasons which are sufficient to influence the court to a particular conclusion in one case ought to be sufficient to bring it or any other court to the same conclusion in all other similar cases where there has been no change in the law since the decision. There will thus be uniform rules for the administration of justice, and the same measure that is meted out to one would be received by all others. And even if the same or any other court, in a subsequent case, should be in doubt concerning the correctness of the decision which has been made, there are consequences of a very grave character to be contemplated and weighed before the experiment of disregarding it should be ventured upon. That state of things, when judicial decisions conflict, so that a citizen is always at a loss in regard to his rights and his duties, is a very serious evil; and the alternative of accepting adjudged cases as precedents in future controversies resting upon analogous facts, and brought within the same reasons, is obviously preferable. Precedents, therefore, become important, and counsel are allowed and expected to call the attention of the court to them, not as concluding controversies, but as guides to the judicial mind.

§ 114. Kent says: "A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted

and declared, even if erroneous, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, if it has been acted on as settled law, except for very urgent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a perplexing uncertainty as to the law."<sup>1</sup> It is better to leave it to the Legislature to correct the error.

§ 115. The doctrine of *res adjudicata* applies as well to judgments of courts of last resort as to those of *visi prius* or inferior courts (inferior in the sense that an appeal lies from their judgments). If the same subject matter comes in question in a second action in a court of last resort, it is bound by its own former decision. When the rights of parties have been decided by a court of last resort, whether such decision be right or wrong, by reason of inadvertence, misapprehension, or from other causes the decision so rendered becomes the law of the case, for all subsequent proceedings in it, and is a final adjudication, if the same question should arise between the same parties, or those claiming under them, in a subsequent action, the decision first rendered is conclusively binding upon the court, and cannot be re-examined upon a subsequent appeal, though such court should doubt the correctness of the decision; for it possesses no power to reverse the former decision. The doctrine of the law of the case applies only to the parties or their privies, upon the same cause of action, or substantially the same state of facts. If the judgment

<sup>1</sup> King v. Younger, 5 T. R. 450; Boone v. Bowers, 30 Miss. 246; Palmer v. Laurence, 5 N. Y. 359; Knee-land v. Milwaukee, 15 Wis. 454; Rex v. Cox, 2 Burr. 787; Selby v. Bardon, 3 B. & Ad. 17; Fletcher v. Soudes. Cro. Jac. 527; Broom's Max. 109; Hammond v. Anderson, 4 B. & P. 69; Anderson v. Jackson, 16 Johns. 382; Fletcher v. Lord Somers, 3 Bing. 588; Goodtitle v. Otway, 7 T. R. 416; Goodell v. Jackson, 29 Johns. 693; Bates v. Relyea, 23 Wend. 336; Emerson v. Atwater, 7 Mich. 12; Nelson v. Allen, 1 Yerg. 360; State v. Whitworth, 8 Lea 594; McCutcheon v. Homer, 43 Mich. 483; Durant v. Essex Co., 101 U. S. 555; Lemp v. Hastings, 4 Greene, Ia. 448; Kearney v. Battles, 1 Ohio S. 362; Johnson v. Fall, 6 Cal. 359, Seale v. Mitchell, 5 Cal. 491; Miller v. Bernecker, 46 Mo. 194; Reichert v. McClure, 23 Ill. 516; Fisher v. Horicon, & Co., 10 Wis. 351; Mathewson v. Hearin, 29 Ala. 210; Field v. Goldsby, 28 Ala. 218; Willis v. Owen, 43 Tex. 41; Strong v. Clem, 12 Ind. 37; Harrow v. Myers, 29 Ind. 469; Hahn v. Curtis, 31 Cal. 398; McVay v. Ijams, 27 Ala. 238; Cramer v. Stone, 38 Wis. 259.

be reversed and the cause remanded to the court below for a new trial, a second appeal taken, brings up for a review and decision nothing but the proceedings subsequent to the reversal; none of the questions which were before the court and decided on the first appeal can be reheard or re-examined upon the second appeal. The decision of a court of final resort upon a given state of facts, becomes the law of the case in regard to such facts. If the cause be remanded for a new trial, the parties have the right to introduce new evidence and establish a new state of facts; when this is done the decision of the court of last resort ceases to be the law of the case. The trial court is not conclusively bound by the prior decision but is to apply the law applicable to the new and changed state of facts; but if such cause is submitted to the court or jury for a retrial upon the same identical facts upon which the appellate court rendered its decision, that decision remains the law of the case, and the *nisi prius* court must apply the law as laid down by the appellate court to the facts submitted to the court or jury. It cannot vary the decree or examine it for any other purpose than execution, or give any other or further relief, or revise it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded. While the doctrine of such case may be reconsidered and overruled in another case, it cannot be varied or departed from in the same case.<sup>1</sup> Thus, if

<sup>1</sup> Himely v. Rose, 5 Cranch, 313; Martin v. Hunter, 1 Wheat. 304; The Sancta Maria, 10 Wheat. 431; Browder v. McArthur, 7 Wheat. 58; Ins. Co. v. Carter, 1 Pet. 511; Thomas v. Doub, 1 Md. 252; Bangs v. Stroug, 4 N. Y. 315; Parker v. Pomeroy, 2 Wis. 112; Downer v. Cross, 2 Wis. 371; State v. Newkirk, 49 Mo. 472; Caldwell v. Bruggeman, 8 Minn. 286; Miner v. Medbury, 7 Wis. 100; Ogden v. Bowen, 5 Ill. 301; Gregory v. Slaughter, 19 Ind. 342; Holley v. Holley, 5 Litt. 290; Byrne v. Edmonds, 23 Gratt. 200; Kent v. Dickenson, 26 Gratt. 1009; Elston v. Kennicott, 53 Ill. 272; Tutt v. Slaughter, 5 Gratt. 364; Hobson v. Doe, 4 Blackf. 487;

Sims v. Reed, 12 B. Mon. 51; Musgrave v. Staylor, 36 Md. 123; McDonald v. Green, 21 Miss. 445; Chambers v. Smith, 30 Mo. 156; Kibler v. Bridges, 5 S. C. 235; McNairy v. Nashville, 2 Baxt. 251; Bank v. McVeigh, 29 Gratt. 546; Camden v. Werninger, 7 W. Va. 523; Emory v. Owings, 3 Md. 178; Preston v. Leighton, 6 Md. 88; Hammond v. Inloes, 4 Md. 138; Eyler v. Hoover, 8 Md. 1; Mong v. Bell, 7 Gill, 246; Brown v. Summerville, 8 Md. 444; Polack v. McGrath, 38 Cal. 666; McKinley v. Tuttle, 42 Cal. 570; Brandon v. Fitts, 94 Pa. St. 88; Mason v. Mason, 5 Bush, 187; Adams v. Horsefield, 14 Ala. 223; Jesse v. Cater, 28 Ala. 475; Hart

an appellate court has ever so erroneously decided that it has jurisdiction of a cause and then proceeds to determine it on its merits, the parties to the cause are bound as *res adjudicata* by

v. Floyd, 54 Ala. 31; Maulden v. Armistead, 30 Ala. 489; Cowan v. Fulton, 23 Gratt. 579; Goodman v. Walker, 30 Ala. 482; Hollowbush v. McConnell, 12 Ill. 203; Wilson v. Binford, 81 Ind. 588; Bidden v. Graves, 85 Ind. 92; Hawley v. Smith, 45 Ind. 183; Dodge v. Gaylord, 53 Ind. 365; Choteau v. Gibson, 76 Mo. 38; Oil Co. v. Assessors, 34 La. Ann. 618; Simpson v. Hart, 1 Johns. Ch. 91; Gelston v. Codwise, 1 Johns. Ch. 95; Perine v. Dunn, 4 Johns. Ch. 140; Wilcox v. Hawley, 31 N. Y. 648; Hosack v. Rogers, 25 Wend. 313; Goodrich v. Thompson, 4 Conn. 215; Nichols v. Bridgeport, 27 Conn. 459; Henry v. Quackenbush, 48 Mich. 415; Conroy v. Iron Works, 75 Mo. 651; Chambers v. Smith, 30 Mo. 156; Clary v. Hongland, 6 Cal. 685; Gunter v. Laffan, 7 Cal. 588; Soule v. Ritter, 20 Cal. 522; Leese v. Clark, 20 Cal. 387; Phelan v. San Francisco, 20 Cal. 39; Trinity v. McCammon, 25 Cal. 117; Lucas v. San Francisco, 28 Cal. 591; Mitchell v. Davis, 23 Cal. 381; Estate of Pacheco, 29 Cal. 224; Dilla v. Bohall, 62 Cal. 610; Cole v. Clarke, 3 Wis. 323; Ins. Co. v. Clemmitt, 77 Va. 366; Loomis v. Cowen, 106 Ill. 660; Gerber v. Friday, 87 Ind. 366; Armstrong v. Haishman, 93 Ind. 216; Ryan v. Martin, 18 Wis. 672; Pierce v. Kneelant, 9 Wis. 23; Reed v. Jones, 15 Wis. 40; Akety v. Vilis, 24 Wis. 165; Wright v. Sperry, 25 Wis. 617; Noonan v. Orton, 27 Wis. 300; McLeod v. Bertschy, 34 Wis. 344; Dupont v. Davis, 35 Wis. 631; Adams v. Pearson, 7 Pick. 341; Booth v. Commonwealth, 7 Met. 285; Craig v. Bigley, 1 B. Mon. 148; Tribble v. Frame, 3 T. B. Mon. 51; Moss v.

Rowland, 3 Bush, 505; Groff v. Groff, 14 S. & R. 181; Gratz v. Bank, 17 S. & R. 278; Chambers v. Hodges, 3 Tex. 528; Hough v. Haver, 34 Ill. 309; Johnson v. Von Kettie, 84 Ill. 315; New Haven, & Co. v. State, 14 Conn. 376; Guest v. Brookden, 73 N. Y. 506; Alexander v. Worthington, 5 Md. 471; Stacey v. R. R. Co., 22 Vt. 551; Bryant v. Boothe, 35 Ala. 269; Atkins v. Wyman, 45 Me. 399; Banc v. Wiet, 6 Ohio S. 13; Hungerford v. Cushing, 8 Wis. 321; Roundtree v. Turner, 26 Ala. 555; State v. Chase, 5 Ill. & J. 293; People v. Skidmore, 27 Cal. 287; Kugely v. Robinson, 19 Ala. 404; Young v. Harrison, 21 Ga. 584; Corbell v. Zeluff, 12 Gratt. 226; Rust v. Garmany, 36 Ga. 257; Davidson v. Dallas, 15 Cal. 75; Breeding v. Biocher, 29 Pa. St. 317; Meadow Co. v. Church, 2 N. J. 424; Wilkes v. Coopwood, 29 Miss. 318; Sturgis v. Rogers, 26 Ind. 1; Mitchell v. Mitchell, 6 Md. 221; Table, &c. Co. v. Stranahan, 21 Cal. 548; Miller v. Barkeloo, 18 Ark. 292; Barkeloo v. Miller, 18 Ark. 297; Wall v. Wall, 2 H. & G. 79; Yale v. Dederer, 68 N. Y. 329; Smith v. Maryland, 6 Cranch, 286; Crowell v. Gilmore, 17 Cal. 191; Doe v. Watson, 8 How. 263; State v. Buchanan, 5 Ill. & J. 331; Thompson v. Hatch, 3 Pick. 512; Wright v. Sill, 2 Black, 511; Martin v. Martin, 25 Ala. 301; Rockhill v. Nelson, 24 Ind. 122; Ewing v. Ewing, 22 Ind. 468; Grubbs v. State, 24 Ind. 295; Gray v. Gray, 34 Ga. 490; Michall v. Morey, 26 Ind. 239; Thompson v. Albert, 15 Md. 268; Bennett v. Bennett, 34 Ala. 53; Thompson v. Dan, 44 Ala. 175; Huffman v. State, 39 Ala. 532; Pickens v. Oliver, 32 Ala. 621; Dugan v. Hollins, 13 Md. 149; Stien

the decision of the court, that it has jurisdiction as well by the decision of the court on its merits.<sup>1</sup> Such court cannot examine

v. Ashby, 30 Ala. 363; Pearson v. Darrington, 32 Ala. 237; Attorney General v. Lum, 2 Wis. 507; Word v. Wheeler, 9 Tex. 137; Pingry v. Watkins, 17 Vt. 379; Goodwin v. McGee, 15 Ala. 232; Price v. Price, 23 Ala. 609; Jaafe v. Skae, 48 Cal. 541; Hemlin v. Martin, 59 Cal. 181; Yates v. Smith, 40 Cal. 662; Dewey v. Gray, 2 Cal. 374; Trustees v. Stocker, 42 N. J. L. 117; Bank v. Taylor, 62 Mo. 388; Warren v. Raymond, 17 S. C. 163; Kibler v. Bridges, 5 S. C. 335; Board v. Jemison, 86 Ind. 154; Gerber v. Friday, 87 Ind. 366; Multnomah Co. v. Sliker, 10 Oreg. 65; Scalde v. Mitchell, 5 Cal. 481; Gillaspie v. Scott, 32 La. An. 767; Adams v. R. R., 55 Iowa, 94; Crane v. Blum, 56 Tex. 325; Montgomery v. Gilmer, 33 Ala. 116; Malone v. Carroll, 33 Ala. 191; Rutherford v. Lafferty, 7 Ark. 402; Henderson v. Winchester, 31 Miss. 290; Fortenberry v. Frazier, 5 Ark. 200; State v. Harrison, 21 Ark. 197; Kendall v. Mather, 48 Tex. 585; Argenti v. San Francisco, 30 Cal. 458; McClelland v. Crook, 7 Gill. 333; Dennis v. Dennis, 15 Md. 73; White v. Atkinson, 2 Cal. 376; Price v. Campbell, 5 Cal. 115; Hite v. Paul, 2 Munf. 154; Henshaw v. Freer, Bailey Eq. 311; Whyte v. Kyle, 1 S. & R. 515; Nieto v. Carpenter, 21 Cal. 455; Russell v. Harris, 44 Cal. 489; Thompson v. Albert, 15 Md. 268; Rector v. Danley, 14 Ark. 304; Biscoe v. Tucker, 14 Ark. 515; Lick v. Diaz, 44 Cal. 479; Sibbald v. U. S., 12 Pet. 488; Tyler v. Maguire, 17 Wall. 283; Bank v. Beverly, 1 How. 134; Bridge Co. v. Stewart, 3 How. 413; Hill v. Bank, 97 U. S. 450; Corning v. Troy, 15 How. 451; Sizer v. Many, 16 How. 98; Roberts v. Cooper, 20 How. 467; Clark v. Keith, 106 U. S. 464; Super-

visors v. Kennicott, 94 U. S. 498; Board v. Ry. Co., 89 Ind. 104; Kress v. State, 65 Ind. 106; Test v. Larsh, 76 Ind. 453; Field v. Goldsby, 28 Ala. 218; Mathews v. Sands, 29 Ala. 126; Miller v. Jones, 29 Ala. 174; Matheson v. Heaim, 29 Ala. 210; Rex v. Cox, 2 Burr. 787; King v. Younger, 5 T. R. 449; Nelson v. Allen, 1 Yerg. 376; King v. Inhabitants, 2 East, 302; Hammond v. Anderson, 4 Bos. & P. 69; King v. North Nibley, 5 T. R. 21; State v. Thompson, 10 La. Ann. 122; McDonald v. Dickson, 87 N. C. 464; R. v. Glynn, L. R. 7 Q. B. 16; R. R. Co. v. Bank, 60 Barb. 234; R. R. Co. v. Reed, 83 Ind. 9; Commrs. v. Pritchett, 85 Ind. 68; House v. Board, 60 Ind. 580; S. C., 28 Am. R. 657; State v. Board, 80 Ind. 478; S. C., 41 Am. R. 821; State v. Demaree, 80 Ind. 519; Braden v. Graves, 85 Ind. 92; R. R. v. Shoup, 28 Kas. 394; Headley v. Challis, 15 Kas. 603; Smith v. Brannin, 79 Ky. 114; Davis v. McCorkle, 14 Bush. 746; Boise v. Dickson, 32 La. An. 1150; Adair v. Ownby, 75 Mo. 283; Overall v. Ellis, 38 Mo. 209; Benjamin v. Covert, 45 Wis. 157; Blesch v. R. R., 48 Wis. 168; Hutchinson v. R. R., 41 Wis. 541; DuPoint v. Davis, 35 Wis. 631; Lathrop v. Knapp, 37 Wis. 307; Diedrich v. Ry. Co., 42 Wis. 248; Brooks v. Brooks, 16 S. C. 64; Hill v. Hoover, 9 Wis. 15.

<sup>1</sup> Davis v. Packard, 8 Pet. 312; Skillern v. May, 6 Cranch, 267; Clary v. Hoagland, 6 Cal. 685; Hungerford v. Cusling, 8 Wis. 324; Bank v. Craig, 6 Leigh, 399; Campbell v. Campbell, 22 Grat. 649; Bridge Co. v. Stewart, 3 How. 413; Johnson v. Glascock, 2 Ala. 519; Cunningham v. Ashley, 13 Ark. 653; Reed v. West, 70 Ill. 479; Mathews v. Sands, 29

the propriety of a decision made at a former term *inter-partes*, nor set aside such a decision on the ground that it decided matters *coram non judice* at the time. Otherwise, by the interposition of a new judge, the law, which has been settled by the majority of the court for years, might be changed and a new rule introduced. Cases which have been brought to such courts on *certiorari* or writs of error, and determined, might be reopened, and rights which have grown up under them be disturbed.

Thus, in a chancery cause a commissioner reported that the lands of *certain persons not parties to the cause* were liable to be sold in the cause, the court confirmed this report, and ordered the sale of their lands, they appealed from this decision, and the appellate court on their appeal heard the cause on its merits and affirmed the decree, the appellants were bound by the decree, as *res adjudicata*, as the appellate court in so deciding, *must have held that it had jurisdiction not only of the cause but also of the parties*; and that judgment, as well as that on the merits of the case, was binding on the parties.<sup>1</sup>

But where the Supreme Court has based its judgment upon the concessions of counsel it is nevertheless not precluded, on another trial, from questioning the legal soundness of these concessions; *it seems*, however, that the parties themselves are not at liberty to dispute the ground of the judgment, but must be governed throughout by the rule first laid down.<sup>2</sup>

§ 116. The conclusiveness of a decision or decree of a court of last resort, is not vitiated by the fact that it is one of affirmance by a divided court, it forever settles the question decided as to that case.<sup>3</sup> The authorities declaring that a decision of an appellate court, however erroneous, is the law of the particular case, and cannot be questioned in the primary court, or on a second appeal, is not the expression of a mere rule of practice,

Ala. 136; Miller v. Jones, 29 Ala. 174; Porter v. Hanley, 10 Ark. 186; Haynes v. Meeks, 20 Cal. 288; Bradford v. Patterson, 1 A. K. Marsh, 464.

<sup>1</sup> Renick v. Ludington, 20 W. Va. 511.

<sup>2</sup> Henry v. Quackenbush, 48 Mich. 415.

<sup>3</sup> Durant v. Essex Co., 7 Wall. 107; People v. Circuit Judge, 37 Mich. 377; Etting v. Bank, 11 Wheat. 59; Morse v. Gould, 11 N. Y. 281; Carleton v. Davis, 8 Allen, 94; Durant v. Essex Co., 8 Allen, 103; Bridge v. Johnson, 5 Wend. 342; Bridge Co. v. Stewart, 3 How. 413.

but is founded on the conclusiveness of judgments. But the exception to this rule of conclusiveness is, that it does not apply to points not under consideration, or incidentally considered, or which can only be argumentatively inferred from the judgment.<sup>1</sup> So where a cause is determined by the highest court of a State, that judgment being final, if the case is reversed and remanded to the tribunal in which it was first tried, and there dismissed, the judgment of the appellate court is conclusive in another action brought by either of the parties. Thus where A. and B. as partners brought a suit in equity, one question was decided adversely to them, that decision was affirmed on appeal, and the cause remanded—when the plaintiffs voluntarily dismissed it. In another action brought by A. alone he was estopped from suing on the claim.<sup>2</sup> So where a writ of error is dismissed for irregularity, it affirms the judgment of the court below and makes it *res judicata*.<sup>3</sup>

§ 117. It cannot be said that a case is not authority on one point, because, although that point was properly presented and decided in the regular course of the consideration of the case, something else was found in the end which disposed of the whole matter.<sup>4</sup> A proposition assumed or decided by the court to be true, and which must be so assumed to establish another proposition which expresses the conclusion of the court, is as effectually passed upon as the matter directly decided.<sup>5</sup> Where the record fairly presents two points, upon either of which the decision might turn, and the court fully considers and determines both, the decision of neither can be regarded as an *obiter dictum*, and the judgment is authoritative on both points.<sup>6</sup>

<sup>1</sup> Woodgate v. Fleet, 44 N. Y. 1; People v. Johnson, 38 N. Y. 63; Hotchkiss v. Nichols, 3 Conn. 138; Coit v. Tracy, 8 Conn. 268; Dickerson v. Hayes, 31 Conn. 417; Leonard v. Whitney, 109 Mass. 265; Hardy v. Mills, 35 Miss. 141; Bassett v. Mitchell, 2 B. & A. 99; Sweet v. Tuttle, 14 N. Y. 465; McCormick's Appeal, 57 Pa. 54; Tams v. Lewis, 42 Pa. 402; Carter v. James, 13 M. & W.

137; People v. San Francisco, 27 Cal. 655; Hadley v. Albany, 33 N. Y. 603.

<sup>2</sup> Croft v. Johnson, 8 Baxter, 390; Trescott v. Barnes, 51 Iowa, 409.

<sup>3</sup> McLendon v. McGlann, 60 Ga. 244.

<sup>4</sup> R. R. Co. v. Schutte, 103 U. S. 118.

<sup>5</sup> Trustees v. Stocker, 42 N. J. L. 115.

<sup>6</sup> Hawes v. Water Co., 5 Sawyer C. Ct. 287.

Stability and certainty in the law are of the very first importance. Hardships may sometimes result from a stern adherence to general rules. This is unavoidable under any system of jurisprudence. Some barrier is essential to guard against uncertainty. If judicial decisions were subject to frequent change, it would disturb and unsettle the great landmarks of property. The certainty of a rule is often more important than the reason of it; the maxim, *stare decisis et non quieta movere*, is the safe and judicial policy, and should be adhered to. If the law, as heretofore pronounced by a court, in giving construction to a statute, ought not to stand, it is in the power of the legislature to amend it without impairing rights acquired under it. But where a question involving important private and public rights has been only once passed upon, and cannot be said to have been acquiesced in, it is the duty of the court to re-examine such question judicially when properly called upon,<sup>1</sup> or if the decision is clearly incorrect and no injurious results will be likely to flow from a reversal, and especially if it is injurious and unjust in its operation, it is the imperative duty of the court to reverse it,<sup>2</sup> and the doctrine of *Stare decisis* should lead any court to conform to a well established principle of mercantile law, and reverse a decision made by it which is an injudicious innovation upon that principle.<sup>3</sup>

§ 118. After a recovery by process of law, there must be an end to litigation; if it were otherwise, there would be no security for any person, and great oppression might be done under color and pretense of law.<sup>4</sup> To fathom the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it, would be extremely dangerous; and it is better for the general administration of justice that one individual should be inconvenienced, than that the whole system of jurisprudence be overturned, and endless uncertainty be introduced.<sup>5</sup> And we ought also to see that the first litigation was conducted in entire good faith, and

<sup>1</sup> Pratt v. Brown, 3 Wis. 603.

<sup>2</sup> Linn v. Minor, 4 Nev. 462; Sydney v. Griscoigne, 11 Tex. 449.

<sup>3</sup> And v. Magruder, 10 Cal. 282.

<sup>4</sup> Marriott v. Hampton, 7 T. R. 541.

260; Shaw v. Barnhardt, 17 Ind. 183, Houston v. Royston, 9 Miss. 238.

<sup>5</sup> Reg. v. Justices, 1 Q. B. 631; Schumann v. Weatherhead, 1 East,

all the facts were presented to the court which could properly have weight in the construction and application of the law. These things being manifestly impossible, the law therefore wisely excludes judgments from being used to the prejudice of strangers to the controversy, and restricts their conclusiveness to parties thereto, and their privies.<sup>1</sup> Even parties and privies are bound only so far as regards the subject-matter then involved, and are at liberty to raise the same questions in another distinct controversy affecting a distinct cause of action.<sup>2</sup>

§ 119. And if there be any one principle of law well settled, beyond all question, it is this: that whensoever a cause of action, in the language of the law, "*transit in rem judicatum*," and the judgment thereon remains in full force and unreversed, the original cause of action is merged, and gone forever.<sup>3</sup> The

<sup>1</sup> Burrill v. West, 2 N. H. 190; Davis v. Wood, 1 Wheat. 6; Jackson v. Vedder, 3 Johns 8; Van Bookklein v. Ingersoll, 5 Wend. 315; Case v. Reve, 14 Johns. 80; Smith v. Balantyne, 10 Paige, 101; Alexander v. Taylor, 4 Denio, 302; Orphan House v. Laurence, 11 Paige, 80; Wood v. Stephen, 1 S. & R. 175; Thomas v. Hubbell, 13 N. Y. 405; Peterson v. Lothrop, 84 Penn. St. 238; Twambly v. Henly, 4 Mass. 448; Estey v. Strong, 2 Ohio, 401; Cowles v. Hartz, 3 Conn. 522; Floyd v. Mizizer, 5 Rich. 361; Riggins v. Brown, 12 Georgia, 271; Person v. Jones, 12 Georgia, 671; Maple v. Beach, 43 Ind. 51; Hawes v. Water Co., 5 Sawyer, 287; Trustees v. Stocker, 42 N. J. L. 115; R. R. Co. v. Schutte, 103 U. S. 118; Wood v. Davis, 7 Cranch, 271; Paynes v. Coates, 1 Munf. 373; Turpin v. Thomas, 2 H. & M. 139; Ryer v. Atwater, 4 Conn. 431; Killinsworth v. Bradford, 2 Overt. 204; Estep v. Hutchman, 14 S. & R. 435; Tabor v. Perrott, 2 Gall. 565; Respublica v. Davis, 3 Yeates, 128; Johnson v. Bourn, 1 Wash. 187; Stevehe v. Read, 3 Wash. C. C. 274; Cleaton v. Cham-

bliss, 6 Rand. 86; Neal v. McComb, 2 Yerg. 16; Blount v. Darrack, 14 S. & R. 184; Fisk v. Weston, 5 Me. 410; James v. Stookey, 1 Wash. C. C. 530; Chapman v. Chapman, 1 Munf. 398; Frazier v. Frazier, 2 Leigh, 642; Munford v. Overseers, 2 Rand 813; Michan v. Wyatt, 21 Ala. 813; Fallon v. Murray, 16 Mo. 168; Duncan v. Helms, 8 Gratt. 68; Chamberlain v. Carlisle, 26 N. H. 540; Mackey v. Coates, 70 Pa. 350; Cable v. Laiking, 9 Bush, 154; Bissell v. Kellogg, 65 N. Y. 432

<sup>2</sup> Vanalstyne v. R. R. Co., 34 Barb. 28; Cook v. Viemont, 6 B. Mon. 284; Taylor v. McCracken, 2 Blackf. 260; Spencer v. Dearth, 43 Vt. 98.

<sup>3</sup> Savage v. Stevens, 128 Mass. 254; Savin v. Bond, 57 Md. 238; Commrs. v. Binford, 70 Ind. 208; Savage v. French, 13 Ill. App. 17; Caldwell v. White, 77 Mo. 471; Cemetery v. People, 92 Ill. 619; Law v. McDonald, 63 How. Pr. 340; R. R. Co. v. Schwartz, 13 Ill. App. 490; Battys v. R. R. Co., 43 Iowa 602; Nelson v. Couch, 15 C. B. N. S. 99; Follett v. Hoppe, 5 C. B. 238, Hamlet v. Richardson, 9 Bing. 641; U.

effect of *res judicata* so completely excludes all proof to the contrary, that the party against whom judgment has been rendered cannot impeach it even by written receipts of payment which have been since discovered.<sup>1</sup> "*Sub specie novorum instrumentorum postea repertorum res judicata restaurari exemplo quare est.*" For in the language of the civil law: "*res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum.*" The case of *Marriot v. Hampton*, illustrates this principle. Thus, where A. sued B. for the price of goods sold, for which B. had paid and obtained a receipt before the suit was commenced, not being able to find his receipt, and having no other proof of payment, A. recovered judgment against B. for the price of the goods sold; B. was obliged to submit to the payment of the money again, but afterwards found the missing receipt, and brought an action against A. for money had and received, to recover back the amount of the sum of payment thus wrongfully enforced; but he was estopped on the ground that the former suit was conclusive, and that money paid under legal process could not be recovered back again, and the same evidence used in the second suit would have been a good defense in the first; B. was bound to either produce the evidence or submit to the judgment of the court, and that, when, once *res judicata*, it was conclusive in any subsequent action arising from the same transaction. If mistakes in practice or inadvertence furnished reasons for avoiding judgments, it would encourage litigation and reward carelessness at the expense of the other party, and therefore the law acts upon the maxim, *Interest reipublice ut sit finis litium.*<sup>2</sup>

*S. v. Leffler*, 11 Peters, 100; *Robinson v. Smith*, 18 Johns 463; *Caylus v. R. R.*, 60 N. Y. 609; *Howell v. Earp*, 21 Hun. 300; *Arnold v. Kyle*, 8 Baxt. 319; *Matthews v. Green*, 13 Phila. 341; *Tuttle v. Harill*, 85 N. C. 456; *Malley v. Malley*, 52 Iowa, 651; *Goddard v. Gray*, L. R. 6 Q. B. 139; *Field v. McKinney*, 60 Miss. 63; *Burritt v. Belfry*, 47 Conn. 323; *S. C.*, 37 Am. R. 79; *Johnson v. Stalcup*, 4 Baxt. 283; *Preble v. Supervisors*, 8 Biss. 353; *Mason v. Buchtel*, 101 U. S. 673;

*Robinson v. Marks*, 19 Hun. 325; *Davis v. Bedsole*, 69 Ala. 363; *Norwood v. Kirby*, 70 Ala. 397; *Fogg v. Sanborn*, 48 Me. 432.

<sup>1</sup> *Marriott v. Hampton*, 7 T. R. 269; *Allison's Case*, L. R. 9 Ch. App. 24; *Heath v. Frackelton*, 20 Wis. 320; *De Cadaval v. Collins*, 4 A. & E. 867; *Miller v. Albaugh*, 21 Iowa, 128.

<sup>2</sup> *Great, &c. Co. v. Mossop*, 17 C. B. 140; *Cammell v. Sewell*, 3 H. & N. 647; *Brotherhood in re*, 31 L. J. Ch. 865; *Beavant v. Mornington*, 7 H.

§ 120. The question frequently arises as to the effect of two or more actions pending at the same time for the same cause. There can be no question but that a plaintiff may bring an action in every State of the Union against a party if he can obtain either personal or constructive service so as to bring the party or his property within the jurisdiction of each State court, and it is also well settled that an action pending in a foreign jurisdiction is no defense to an action in another.<sup>1</sup> There may be circumstances under which the pendency of an action may be pleaded, in abatement of another upon the same cause, but it must be set up as a defense in the action last brought. This being the general doctrine, there is another which will relieve the party from numerous suits and harassing litigation. That a judgment, no matter where rendered, if it be of a tribunal of competent jurisdiction, is a complete defense in any court when alleged by a defendant. The judgment first rendered merges the cause of action. Therefore it is immaterial at what time the judgment is rendered; whether prior or subsequent to the commencement of the action in which it was presented, it is a bar to such action.<sup>2</sup> A prior judgment upon the same cause of action, sustains the plea of former recovery: although the judgment is in an action commenced subsequently to the one in which it is pleaded. The date is of no consequence; it is the fact of an adjudication between the same parties upon the same subject-matter, which gives effect to the former recovery. The operation of this rule is the same, whether the record be pleaded by the one or the other of the parties. It is not the priority in the commencement of one action that renders the judgment obtained therein a bar to the recovery of a second

L. C. 540; *Wilson v. Ray*, 10 A. & E. 32; *Belcher v. Mills*, 2 C. M. & R. 150; *Reynolds v. Wedd*, 4 Bing. N. C. 694; *Le Chevalier v. Lynch*, 1 Dougl. 170; *Phillips v. Hunter*, 2 H. Bl. 413; *Philpot v. Aslett*, 1 C. M. & R. 85; *Lane v. Chapman*, 11 A. & E. 966; *Denne v. Knott*, 7 M. & W. 143.  
<sup>1</sup> *Bowne v. Joy*, 9 Johns 231; *Walsh v. Durkin*, 12 Johns 99; *Maule v. Murray*, 7 T. R. 470; *Haight*

*v. Holley*, 3 Wend. 461; *Hatch v. Spofford*, 22 Conn. 485; *Weeks v. Pearson*, 5 N. H. 324; *McGilvray v. Avery*, 30 Vt. 538.

<sup>2</sup> *Casebeer v. Mowry*, 55 Pa. 519; *Duffy v. Lyttle*, 5 Watts. 120; *Savage v. Stevens*, 128 Mass. 254; *Child v. Eureka Works*, 45 N. H. 547; *Bank v. Bank*, 7 Gill, 415; *Rogers v. Odell*, 39 N. H. 452; *Whitehurst v. Rogers* 38 Md. 503.

judgment in another, but because the first judgment, when given whether in the action commenced first or last, extinguishes the original cause of action, and gives to the plaintiff, in lien thereof, one of a higher nature. And an action cannot be maintained on the original demand. Thus, where an action was commenced in 1875, and the defendants pleaded therein in 1876, the defendants obtained leave to file an amended answer. They alleged that the plaintiff ought not further to maintain his action because on a day prior thereto he recovered a judgment against the defendants in another State for the same cause of action in a suit commenced in said State since the issuing of the original writ in this case, which judgment remained unreversed and in full force and effect. This defense was held to be directed against the right of the plaintiff to recover in the form of action adopted by him (the original cause), and that it was properly interposed as a special plea in bar to the further maintenance of the action.<sup>1</sup> The date of the acts charged, does not necessarily affect the operation of the plea of *res adjudicata*; a verdict and judgment between the same parties, used either in pleading or evidence, as a protection in a second suit, is equally conclusive, where the same damages are sought to be recovered, and where different damages are claimed for a posterior violation of the same right. If the same question of right is involved in the second suit, as was determined in the first—whatever distance in time occurs between the acts bringing the right in question—the former decision is effective.<sup>2</sup> Thus, where a judgment had been recovered in a suit in partition the parties appealed from the judgment; pending the appeal, and prior to its reversal by the Supreme Court, the defendants recovered a judgment in an action of ejectment for the same land in controversy in the partition suit. After the reversal of the judgment in the partition suit, the defendants plead their judgment in the ejectment suit as a bar to the further maintenance of the partition suit; it was held a good plea.<sup>3</sup> So a judgment on a note lost after maturity is a complete bar to

<sup>1</sup> Bank v. Bank, 7 Gill, 415; Child 503.

v. Eureka Co., 45 N. H. 517; Savage

v. Stevens, 128 Mass. 254.

<sup>2</sup> Whitehurst v. Rogers, 38 Md. Spikes, 33 Ark. 801.

<sup>3</sup> Martin v. Walker, 60 Cal. 94; for a contrary doctrine see State v

another action brought by any person who receives it after maturity.<sup>1</sup>

§ 121. Every judgment is *prima facie* a substantial and final determination of the matter in controversy, and this presumption cannot be overcome by extrinsic evidence, unless there is something on the face of it to justify its admission.<sup>2</sup> Thus, park commissioners under the requirement of the law, made an assessment upon property contiguous to the park, for benefits, and returned the same to the circuit court, by which it was found to be valid, and confirmed and divided into yearly installments. On application for judgment for the third yearly installment, it was held that the confirmation of the assessment by the circuit court was *res adjudicata* as to the validity and legality of the assessment, and precluded a re-investigation of the matters so decided.<sup>3</sup> Individual good and public policy both require that there should be some fixed and certain end to litigation, and that suitors that having been once discharged from attendance in court, shall not be again brought before it without sufficient reason, and as this rule must be inflexible to effect its object, it will not yield to the clearest proof that a defense or cause of action was overruled which ought to have been sustained, or sustained when it ought to have been excluded, and that injustice will result unless the mistake is overruled.<sup>4</sup> The conclusive effect of a judgment is the same, whether it was rendered upon the evidence or a technical rule of law,<sup>5</sup> and a plea of a prior recovery, for the same cause of action, cannot be answered by a replication that the decision was not on the merits, without showing that the proceeding was such that they could not have been decided.<sup>6</sup> Suitors are bound to prepare and present their cases in a proper manner, and cannot allege their own carelessness or ignorance as a cause for being

<sup>1</sup> Elliott v. Woodward, 18 Ind. 183.

<sup>2</sup> Zimmerman v. Zimmerman, 15 Ill. 84; Stearns v. Stearns, 32 Vt. 678.

<sup>3</sup> People v. Brislin, 80 Ill. 423; Lehmen v. People, 80 Ill. 601; Barrett v. Failing, 8 Oreg. 152; Bower v. Tillman, 5 W. & S. 556; Smith v. Whitney, 11 Mass. 445; Beale v. Pearce, 12 Md. 580; Barnett v. Failing, 8 Oreg. 152.

<sup>4</sup> Mondel v. Steele, 8 M. & W. 588; Cases Supra, Note 2.

<sup>5</sup> Green v. Clark, 5 Denio, 497; Kilheffer v. Heir, 17 S. & R. 319; Dewey v. Peck, 33 Iowa, 242; Allison's Case, L. R. 9 Ch. App. 24; Davies v. Mayor, 93 N. Y. 250.

<sup>6</sup> Agnew v. McIlroy, 18 Miss 552; Kilheffer v. Heir, 17 S. & R. 319; Lewis v. Neuzell, 38 Pa. 223

relieved from its consequences.<sup>1</sup> A defendant cannot escape from the consequences of an adverse judgment on the ground that he had a good defense in fact, and relied inconsiderately on an untenable point of law; and a plaintiff is precluded from regaining his mistakes or omissions by recourse to another action, unless under rare and peculiar circumstances.<sup>2</sup> Thus, M. and B. were partners, and having agreed to arbitrate their partnership difficulties, deposited notes for \$1,200 each with the arbitrators, who on their award being made, were to deliver to the one who should be found creditor of the other the note of the latter indorsed down to the amount of the balance awarded. The award was in M.'s favor, and B.'s note was delivered to him. Afterwards, B. brought suit in chancery to have the award corrected on the ground of mistake, and he was allowed a credit, to be deducted from the note, for an item which by accident and mistake was not brought to the attention of the arbitrators. The action in this case was brought on said promissory note. On the trial, B. sought to show that the award was not valid, and it was held that the decree in the chancery suit precluded him from this defense. He relied on the ground that no point was made in the chancery suit upon the validity of the award, and that, in the absence of such an issue, it remained undisposed of and open to litigation at law. The bill was based on the alleged existence of a valid award, and was inconsistent with anything else; if no valid award existed, there was a perfect defense at law, because the note in such case was not delivered as a binding obligation, and was not in the hands of a *bona fide* holder; the whole controversy in the chancery cause turned on the assumption that nothing remained open except the item overlooked on the arbitration; a party cannot get relief on one basis and then seek a new chance to litigate on the suggestion that he has a defense which he did not see fit to rely on before; and that the ruling of the court below, that B.

<sup>1</sup> Dewey v. Peck, 33 Iowa, 242.

<sup>2</sup> Foster v. Wells, 1 Tex. 101; Society, &c. v. Hartland, 2 Paine C. C. 536; Parrish v. Ferris, 2 Black, 606; R. R. v. Erie, 1 Grant's Cas. 212; Demarest v. Darg, 32 N. Y. 281; Wingate v. Haywood, 40 N. H. 434;

Housemire v. Moulton, 15 Ind. 367; Simes v. Zane, 24 Pa. 242; Zimmerman v. Zimmerman, 15 Ill. 84; Keokuk v. Alexander, 21 Iowa, 397; Fuller v. Jones, 5 Jones Eq. 192; Thornton v. Cambell, 6 Fla. 546, Merwin v. Parker, 18 Ala. 241.

was concluded by the decree, was correct.<sup>1</sup> Where a party who is sued at law has a valid defense but neglects to make it, and allows judgment to be taken against him, cannot afterwards maintain an equitable proceeding to be relieved from the judgment, having been accorded an opportunity to litigate his defense in the action at law; that opportunity neglected, it is gone forever.<sup>2</sup>

§ 122. What matters are included under the term *res adjudicata*. The judgment or decree of a court possessing competent jurisdiction is final as to the subject-matter thereby determined. The principle, however, extends further. It is not only final as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided. The reasons in favor of this extent of the rule are found in the expediency and propriety of silencing the contentions of parties and of accomplishing the ends of justice by a single and speedy decision of all their rights. It is evidently proper to prescribe some period to controversies of this sort; and what period can be more fit and proper than that which affords a full and fair opportunity to examine and decide all their claims? This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous and often oppressive. It might tend to unsettle all the determinations of law and open a door for infinite vexation. This rule is founded on sound principle.<sup>3</sup>

<sup>1</sup> Beam v. Macomber, 35 Mich. 455.

<sup>2</sup> Jackson v. Patrick, 19 S. C. 19; Bull v. Rowe, 13 S. C. 355.

<sup>3</sup> Eastman v. Porter, 14 Wis. 39; Sheppardson v. Cary, 29 Wis. 34; Roby v. Rainsberger, 27 Ohio S. 674; Ellis v. Clarke, 19 Ark. 420; Mosby v. Wall, 23 Miss. 81; Danaher v. Prentiss, 23 Wis. 311; Wittick v. Traun, 25 Ala. 317; Noble v. Cope's Adm'rs, 50 Pa. St. 17; Cypert v. McClure, 22 Pa. St. 193; Hamner v. Griffith, 1 Grant's Cases, 193; Bloodgood v. Grasey, 31 Ala. 575; Burdick v. Post, 13 Barb. 168;

Bridge v. Sargeant, 27 Ohio St. 233; Mallony v. Horan, 49 N. Y. 111; Burford v. Kersey, 48 Miss. 643; Hyatt v. Bates, 35 Barb. 308; Harris v. Harris, 36 Barb. 58; Babcock v. Camp, 12 Ohio, 11; Duncan v. Holcomb, 26 Ind. 378; Keokuk County v. Alexander, 21 Ia. 377; Hobbs v. Parker, 31 Me. 143; Lindsley v. Thompson, 1 Tenn. Ch. 272; Strong v. Hool, 41 Wis. 659; Driscoll v. Damp, 16 Wis. 106; Petersine v. Thomas, 28 Ohio S. 596; Phelan v. Gardner, 43 Cal. 306; Rogers v. Higgins, 57 Ill. 294; Chesapeake, &c. Co.

§ 123. When a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in controversy, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of the case. The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it.<sup>1</sup> Thus, where a judgment of foreclosure was

v. Gittings, 36 Md. 276; Hungerford's Appeal, 41 Conn. 322; Bates v. Spooner, 45 Ind. 489; Burlen v. Shannon, 99 Mass. 200; Lea v. Lea, 99 Mass. 493; Street v. Beckman, 43 Ia. 496; R. R. v. Clark, 21 Ind. 150; Horton v. Hamilton, 20 Tex. 606; Barnum v. Reynolds, 38 Cal. 643; Putnam v. New Albany, 4 Biss. 365; Lewis' Appeal, 67 Pa. St. 153; Goenen v. Schroeder, 18 Minn. 68; Dickson v. Merritt, 21 Minn. 196; Bradley v. Johnson, 49 Ga. 412; Williams v. Walker, 62 Ill. 517; Hudson v. Smith, 39 N. Y. Superior Ct. 452; Aurora v. West, 7 Wall. 82; Davis v. Brown, 94 U. S. 423; Russell v. Place, 94 U. S. 606; Allie v. Schmitz, 17 Wis. 169; Hamilton v. Quimby, 46 Ill. 90; Leguen v. Governor, 1 Johns. Cas. 492; Harris v. Colquitt, 44 Ga. 663; Whitman v. R. R. Co., 16 Gray, 530; Barker v. Cleveland, 19 Mich. 230; Fischli v. Fischli, 1 Blackf. 360; Stark v. Starr, 94 U. S. 477; Murrell v. Smith, 51 Ala. 301; Kelly v. Donlin, 70 Ill. 378; Haines v. Kennedy, 53 Miss. 103; Johnson v. John-

son, 20 Ill. 215; Knight v. Atkinson, 2 Tenn. Ch. 384; Cook v. Burnley, 45 Tex. 97; Rogers v. Higgins, 57 Ill. 244; People v. San Francisco, 27 Cal. 655; Boston v. Haynes, 23 Cal. 31; McGregor v. Holcomb, 21 Iowa, 411; Bouvillian v. Bourg, 16 La. Ann. 363; Kalisch v. Kalsch, 9 Wis. 529; Shepardson v. Casey, 29 Wis. 34; Armory v. Armory, 26 Wis. 152; State v. Hudson, 37 Ind. 198; Rumrill v. Road Co., 51 Ind. 354; Evans v. Road Co., 51 Ind. 160; Felt v. Lumure, 48 Iowa, 397; Ligon v. Triplett, 13 B. Mon. 281; Nichols v. Dilbrell, 61 Tex. 539; Caldwell v. White, 77 Mo. 471.

<sup>1</sup> New Haven, &c. Co. v. State, 44 Conn. 376; Cromwell v. County of Sac, 94 U. S. 351; Town v. Lanphere, 34 Vt. 365; Davis v. Talcott, 12 N. Y. 184; Marriott v. Hampton, 7 T. R. 265; Bruen v. Hone, 2 Barb. 596; Hamilton v. Quimby, 46 Ill. 90; Shafer v. Scudder, 14 La. Ann. 575; Packet Co. v. Sickles, 24 How. 333; Waring v. Lewis, 53 Ala. 615; Town v. Smith, 14 Mich. 348; Johnson v. Murphy, 17 Tex. 216; Culbertson v. Ellis, 6 McLean, 248; Henderson v. Hen-

taken on a mortgage executed by one of a firm in his own name, but for his firm, in which he assumed the payment of notes of a third party, and a personal judgment for the amount of the notes was taken only against their maker, the proceedings and judgment were a bar to any future suit against the maker of the mortgage and against his partners, who were only jointly liable with him. The mortgage was an entire contract, stipulating for the payment of the money and pledging the land therefor. The plaintiff having brought suit upon the mortgage and taken a judgment of foreclosure only, when he might have taken a personal judgment for the residue, after exhausting the land, he could not afterwards maintain another action to recover a personal judgment for such residue.<sup>1</sup> Where the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the party bringing the action to show that they are not the same. Thus, the plaintiff declared for money had and received; the defendant pleaded a judgment, recovered for \$4,000 in an inferior court in Wales, for the same causes. The plaintiff replied that the causes were not the same. It appeared that the defendant had received, as plaintiff's steward, large sums of money on his account, to a greater amount than the sum for which plaintiff declared in the inferior court, and that plaintiff, believing that defendant had no available property beyond that amount, took judgment by default, and verified for only \$3,500. All those sums which the *plaintiff knew* to be due from defendant when he commenced the first suit were considered as causes of action, for which he had before recovered judgment.<sup>2</sup> So the acceptance of and entry of judgment upon a general offer of

derson, 3 Hare, 115; Farguharson v. Seton, 5 Russ. 45; Partridge v. Osborne, 5 Russ. 195; Chalmey v. Dunsany, 2 Sch. & L. 718; Breadalbane v. Chandos, 7 M. & C. 732, Greathead v. Bromley, 7 T. R. 455; Ricardo v. Garcias, 12 Cl. & F. 400; Packet Co. v. Sickles, 5 Wall. 593; Beam v. McComber, 35 Mich. 455; People v. Brislin, 80 Ill. 423; Crosby v. Jerolman, 37 Ind. 264; Philpot v. Asiett, 1 C. M. & R. 85; Lane v. Chap-

man, 11 A. & E. 966; Le Chevalier v. Lynch, 1 Doug. 170; Denne v. Knott, 7 M. & W. 143; Phillips v. Hunter, 2 H. Bl. 402; Reynolds v. Medd, 4 Bing N. C. 694; Wilson v. Ray, 10 A. & E. 83; Belcher v. Mills, 2 C. M. & R. 150; Raymond v. Rosi, 40 Ohio St. 343 Harbig v. Freund, 69 Ga. 180; Storm v. Ermantrout, 89 Ind. 214.

<sup>1</sup> Crosby v. Jerolman, 37 Ind. 264.

<sup>2</sup> Lord Bagot v. Williams, 3 B. & C. 235.

judgment concludes the plaintiff from bringing a new action for any part of the claim embraced in the complaint, and which might have been litigated in the former action.<sup>1</sup> Thus, in an action brought by a woman, after a divorce, against her former husband, to recover for the maintenance of an infant child of the latter, the defendant answered that he was the father of the child, who was the issue of a marriage between himself and appellant, and that a divorce had been granted appellant on her application and the custody of the child awarded to her. A demurrer to the answer was overruled. Held, that the plaintiff might, if her case warranted it, and should have obtained a provision for the support of the child in her action for divorce, and having taken her decree for divorce and the custody of the child without any provision for its support, she took upon herself the burden of its support, and cannot now maintain an action therefor. If the court in the action for divorce erroneously refused to make her an allowance to be paid by the father of the child for its maintenance, she had her remedy.<sup>2</sup>

§ 124. When there is *res adjudicata* the original cause of action is gone; and it would be destructive of all certainty in the administration of law, in the status of families, and in the enjoyment of rights, if it were not held incumbent on anyone attempting to get rid of a solemn judgment to show that he comes forward to do so with reasonable promptitude and diligence.<sup>3</sup>

§ 125. A judgment decides every matter which pertains to the cause of action or the defense set up, or which is involved in the measure of relief to which the cause of action or defense entitles the party, even though such matter may not be set forth in the pleadings, so as to admit proof and call for an actual decision upon it. Whenever a matter is adjudicated and finally determined by a competent tribunal, it is considered forever at rest. This is a principle upon which the repose of society materially depends, and it therefore prevails, with a very few exceptions, throughout the civilized world. This principle not only

<sup>1</sup> Davies v. Mayor, &c., 93 N. Y. 250.

<sup>2</sup> Husband v. Husband, 10 C. L. J. 177.

<sup>3</sup> Lockyer v. Ferryman L. R. 2 App. Cas. 519; Voorhees v. Bank, 10 Peters, 473; Lyons v. Cooledge, 89 Ill. 529.

embraces what actually was determined, but also extends to every other matter which, under the issues, the parties might have litigated in the case, to every thing within the knowledge of the parties which might have been set up as a ground of relief or defense. This general rule has not only gone unchallenged for more than half a century, but a uniform and unbroken line of cases has given it approval.<sup>1</sup> The only exception to this rule is

<sup>1</sup> *Goodenow v. Litchfield*, 59 Iowa, 226; *Comparet v. Hanna*, 34 Ind. 74; *Cemetery Co. v. People*, 92 Ill. 619; *Crossby v. Jeroloman*, 37 Ind. 264; *Babcock v. Camp*, 12 Ohio, 11; *Bates v. Spooner*, 45 Ind. 489; *Embrey v. Connor*, 3 N. Y. 522; *Ricker v. Pratt*, 48 Ind. 73; *Kelley v. Donlin*, 70 Ill. 378; *Rogers v. Higgins*, 57 Ill. 244; *McCaffrey v. Corrigan*, 49 Ind. 175; *Preble v. Supervisors*, 8 Biss. 358; *Landers v. George*, 49 Ind. 309; *Price v. Dewey*, 6 Sawyer 493; *Malley v. Malley*, 52 Iowa, 654; *Greenup v. Crooks*, 50 Ind. 410; *Thompson v. Myrick*, 24 Minn. 4; *Richardson v. Jones*, 58 Ind. 240; *Evenhart v. Holloway*, 55 Iowa, 179; *Griffin v. Wallace*, 66 Ind. 410; *Radford v. Folsom*, 3 Fed. R. 199; *Ulrich v. Drischell*, 88 Ind. 358; *Fischli v. Fischli*, 1 Blackford, 360; *Green v. Glynn*, 71 Ind. 336; *Newcome v. Wiggins*, 78 Ind. 306; *Ballard v. Ins. Co.*, 81 Ind. 239; *Krutzinger v. Brown*, 72 Ind. 466; *Shepardson v. Cary*, 29 Wis. 34; *Chesapeake v. Gittings*, 36 Md. 299; *Rogers v. Higgins*, 57 Ill. 244; *Phelan v. Gardner*, 43 Cal. 306; *Bates v. Spooner*, 45 Ind. 489; *Petersine v. Thomas*, 28 Ohio S. 596; *Bettys v. R. R.*, 43 Iowa, 602; *Barrett v. Failing*, 8 Ore. 152; *Russell v. Farquhar*, 55 Tex. 355; *Maxwell v. Connor*, 1 Hill Ch. 22; *Moody v. Thurston*, 1 Strange, 481; *Hanna v. Reid*, 102 Ill. 596; *Betts v. Starr*, 5 Conn. 550; *Parker v. Standish*, 3 Pick. 288; *Van Rennsalaer v. Akin*, 23 Wend. 549; *Aurora v. West*, 7 Wall. 82; *Young v. Black*, 7 Cranch, 565; *Miller v. Manice*, 6 Hill, 114; *White v. Coatsworth*, 6 N. Y. 137; *Eastman v. Cooper*, 15 Pick. 276; *Gardner v. Buckbee*, 3 Cow. 120; *Bouchard v. Dias*, 3 Den. 243; *Hayes v. Gudykurst*, 11 Pa. St. 221; *Cromwell v. Sac County*, 94 U. S. 526; *Davis v. Brown*, 94 U. S. 423; *Russell v. Place*, 94 U. S. 606; *Cambell v. Rankin*, 99 U. S. 261; *Smith v. Ontario*, 4 F. R. 389; *Outram v. Morewood*, 3 East, 346; *Marriott v. Hampton*, 7 T. R. 269; *Ashlin v. Parker*, 2 Burr. 665; *W. M. Co. v. Coal Co.*, 10 W. Va. 250; *Corville v. Gilman*, 13 W. Va. 314; *Beckwith v. Thompson*, 18 W. Va. 103; *Griffin v. Seymour*, 15 Iowa, 30; *R. R. Co. v. Griffith*, 76 Va. 918; *Bateman v. Willoe*, 1 Sch. & L. 201; *Grant v. Button*, 14 Johns. 377; *Holden v. Curtis*, 2 N. H. 61; *Thatcher v. Gammon*, 12 Mass. 268; *Schrivver v. Commonwealth*, 2 Rawle, 206; *Hays v. Carr*, 83 Ind. 275; *Carothers v. Sergeant*, 20 W. Va. 35; *Hand v. R. R.*, 17 S. C. 219; *Goddard v. Gray*, L. R. 6 Q. B. 139; *Roscnmuller v. Lampe*, 89 Ill. 312; *Benton v. Burgot*, 3 B. & C. 235; *Parnell v. Hahn*, 61 Cal. 131; *Ruegger v. R. R. Co.*, 103 Ill. 449; *Davis v. Mayor*, 93 N. Y. 250; *Danaher v. Prentice*, 22 Wis. 311; *Hamilton v. Quimby*, 46 Ill. 90; *Johnson v. Johnson*, 30 Ill. 215; *Allie v. Schmitz*, 17 Wis. 169; *Rodgers v. Higgins*, 57 Ill. 244; *Montgomery v. Harrington*, 58 Cal. 270; *Preble v. Supervisors*, 8

where the defendant omits to set off his counter-demands, or the records show that it was withdrawn before judgment, without prejudice to a future action thereon, and unless prevented by statute the defendant may still recover thereon; and where the action is one of several distinct and independent contracts, the rule that whatever might have been litigated will be deemed to have been litigated, applies in its full force only to the particular contract sued on,<sup>1</sup> and in ejectment, where the defendant purchases title after judgment is rendered against him.

§ 126. Matters which have been once settled by judicial authority cannot again be drawn into controversy, as between parties and privies to their decision.<sup>2</sup> As the nature of the judgment

Biss. 358; *Buck v. Collins*, 69 Me. 445; *Treadway v. McDonald*, 51 Iowa, 663; *Devegre v. Devegrev*, 33 La. An. 639; *Louis v. Boston*, 130 Mass. 339; *Randolph v. Little*, 63 Ala. 396; *McWilliams v. Morrell*, 23 Hun. 162; *R. R. Co. v. Schutte*, 103 U. S. 118; *Thompson v. Blanchard*, 2 Lea, 528; *Barriett v. Failing*, 8 Oreg. 153; *Thompson v. Myrick*, 24 Minn. 4; *Scully v. Lowenstein*, 56 Miss. 652; *Hemenway v. Wood*, 53 Iowa, 21; *Nichols v. Dibrrell*, 61 Tex. 539; *Caldwell v. White*, 77 Mo. 471.

<sup>1</sup> *Davis v. Brown*, 94 U. S. 423; *Felton v. Smith*, 88 Ind. 149; *Davis v. Hedges*, L. R. 6 Q. B. 687; *Hindley v. Haslum*, L. R. 3 Q. B. D. 581.

<sup>2</sup> *Richards v. Crawford*, 48 Iowa; *Etheridge v. Osborn*, 12 Wend. 399; *Smith v. Whiting*, 11 Mass. 445; *Price v. King*, 3 Johns. 20; *Young v. Black*, 7 Cranch, 567; *Church v. Leavenworth*, 4 Conn. 274; *Marvin v. Parker*, 18 Ala. 241; *Chapman v. Smith*, 16 How. 14; *Ellis v. Staples*, 9 Humph. 238; *Barnell v. Kenzie*, 3 Lev. 79; *Jones v. Lavender*, 55 Ga. 228; *Davenport v. Barnett*, 51 Ind. 329; *Hanscom v. Hewes*, 12 Gray, 332; *Smith v. Way*, 9 Allen, 472; *Milford v. Holbrook*, 9 Allen, 17;

*Farr v. Ladd*, 37 Vt. 156; *Livermore v. Hershbell*, 3 Pick. 33; *Taylor v. McKnight*, 1 Mo. 282; *Johnson v. Kittredge*, 17 Mass. 76; *Adams v. Pearson*, 7 Pick. 341; *Wells v. Dunch*, 1 Mass. 232; *Hayden v. Boothe*, 2 A. K. Marsh. 353; *Claton v. Chambliss*, 6 Rand. 86; *Bird v. Montgomery*, 34 Tex. 713; *Dixon v. Merritt*, 21 Minn. 196; *Bradley v. Johnson*, 49 Ga. 413; *Whitehurst v. Rogers*, 38 Md. 503; *Dubois v. R. R. Co.*, 5 Fish. Pat. Cas. 208; *Barker v. Cleveland*, 19 Mich. 230; *Bunker v. Tufts*, 57 Me. 417; *Ross v. Wood*, 15 N. Y. Supreme Court, 185; *People v. Brislin*, 80 Ill. 423; *Lehmer v. People*, 80 Ill. 601; *Kitchen v. Clark*, 1 Mo. App. 430; *Brown v. Mayor*, 66 N. Y. 385; *Mokey v. King*, 49 Vt. 304; *Schoch v. Foreman*, 3 Brews. 157; *Wilson v. Boughton*, 50 Mo. 17; *Ashley v. Glasgow*, 7 Mo. 320; *Caldwell v. Lockridge*, 9 Mo. 368; *Hul v. St. Louis*, 20 Mo. 584; *Smith v. Best*, 42 Mo. 685; *Gardner's Appeal*, 89 Pa. St. 528; *Wingate v. Haywood*, 40 N. H. 437; *Weathered v. Mays*, 4 Tex. 387; *R. R. Co. v. Erie*, 1 Grant's Cas. 212; *Megerle v. Ashe*, 33 Cal. 74; *Tucker v. Respass*, 28 Ga. 613; *Shirley v. Frame*, 33 Miss. 653; *Os-*

does not affect the operation of this principle, a decree with regard to the personal status of an individual will be equally conclusive with a decision upon a right of property. Thus, in an action by a woman for a divorce, the complaint averred that the parties were married at a certain time and subsequently cohabited as man and wife. The answer denied that they were ever married and the cohabitation, and prayed that the complaint be dismissed. The court found that they were never married nor was she the wife of the defendant. The plaintiff moved to set aside the decree on the ground that the fact of marriage had been adjudged in a previous partition suit, and the alleged husband was estopped to deny it. The court denied the motion. On the death of the alleged husband, the plaintiff claimed the rights of a widow in his estate, in the absence of any suggestion of a subsequent marriage, the decree was conclusive that the claimant was not the widow of the deceased—its operation to determine the status of the parties was conclusive.<sup>1</sup> So, a judgment finding that a person is an acceptor for accommodation is conclusive that he was not the principal.<sup>2</sup> The appointment or removal of a guardian or administrator,<sup>3</sup> or the adjudication of a question of descent or pedigree is conclusive, not only in the proceeding in which they may take place, but in every other in which the same matter is agitated. The manner in which the question is actually brought before the court is immaterial, as long as it is actually decided; whether the action of the court is formal or summary on motion makes no difference in the conclusiveness of the judgment;<sup>4</sup> if, as it is presumed, until it is otherwise proven, that there

borne v. Atkins, 6 Gray, 422; Koon v. Ivey, 8 Rich. L. 37; Shaw v. Barnhardt, 17 Ind. 183; State v. Beloit, 20 Wis. 79; Williams v. Sidmouth, &c. Co., L.R. 2 Exchq. 284; Baker v. Rand, 13 Barb. 152; Bangor v. Brunswick, 33 Me. 352; Sturtevant v. Randall, 53 Me. 149; Jackson v. Lodge, 36 Cal. 28; Franklin v. Stagg, 22 Mo. 193; Peale v. Routh, 13 La. Ann 254; Taylor v. Chambers, 1 Clark, 124; Burns v. Dodge, 9 Wis. 458; Pease v. Bennett, 17 N. H. 124; Burns v. Milwaukee, &c. Co., 9 Wis. 450; Hill v

Hoover, 9 Wis. 15; Greenleaf v. Ludington, 15 Wis. 558; Roberts v. Heim, 27 Ala. 678; State v. Baldwin, 31 Mo 561; Dolittle v. Don. Mans, 34 Ill. 457; Lee v. Kingsbury, 13 Tex. 68; Sanders v. Godley, 36 Ala. 50.

<sup>1</sup> Armory v. Armory, 26 Wis. 152.

<sup>2</sup> Sturdevant v. Randall, 53 Me. 149; Collier v. Hall, 1 E. D. Smith, 5.

<sup>3</sup> Laurence v. Engleby, 24 Vt. 42; Farrar v. Olmstead, 24 Vt. 123.

<sup>4</sup> Claggett v. Sims, 25 N. H. 462; Townsend v. Townsend, 5 Harr. 20; Demarest v. Darg, 32 N. Y.

was an opportunity to appear and contest the case on its merits; and hence, an adjudication under a rule to show cause will preclude a renewal of the controversy at law,<sup>1</sup> or even an application for relief in equity.<sup>2</sup>

§ 127. The same rule of conclusiveness is applicable in proceedings to revive judgments. The rule that parties are estopped from raising any question which might have been determined in a former action between the same parties, and that all defenses which were waived or withheld after an opportunity to present and litigate them applies with full force in the revival of judgments which have been permitted to become dormant. The doctrine of merger deprives the plaintiff of his cause of action and takes from the defendant all legitimate defenses that he might have made in the original action; nothing can be tried that was litigated, or might have been, at the former trial. The judgment is a complete bar to any defense.<sup>3</sup> The only pleas that will be entertained by courts

281; *Sewell v. Scott*, 35 La. Ann. 553.

<sup>1</sup> *Greathead v. Bromley*, 7 T. R. 455; *Schuman v. Weatherhead*, 1 East, 537.

<sup>2</sup> *Buell v. Cross*, 4 Ohio, 330; *Standifer v. McWhorter*, 1 Stew. 532; *Hook v. Wood*, 3 Miss. 867; *Hunt v. Terrill*, 7 J. J. Marsh. 67; *Cameron v. Bell*, 2 Dana, 328; *Hollister v. Barkley*, 11 N. H. 501; *Starr v. Starr*, 1 Ohio, 321; *Gregory v. Burrall*, 2 Edw. Ch. 417; *Henderson v. Mitchell*, 1 Bail. Ch. 113; *Pratt v. Wayman*, 1 Md. Ch. 156; *Redheimer v. Pyton*, Spears Ch. 34; *Beam v. McComber*, 35 Mich. 435; *Whitwell v. Barbier*, 7 Cal. 54; *Dorente v. Sullivan*, 7 Cal. 279; *Smith v. Bradley*, 14 Miss. 485; *Mooney v. Mass*, 22 Iowa, 380; *Snediker v. Pearson*, 2 Barb. Ch. 107; *Minor v. Stone*, 1 La. Ann. 283; *Dickson v. Richardson*, 16 Ark. 114; *Bently v. Dillard*, 6 Ark. 79; *Brown v. Stone*, 10 Pet. 497; *Houston v. Royston*, 9 Miss. 238; *Thomas v.*

*Phillips*, 12 Miss. 358; *Williams v. Jones*, 18 Miss. 108; *Garden v. Haden*, 7 Leish. 157; *Green v. Robinson*, 5 How. 80; *Vilas v. Jones*, 1 N. Y. 274; *Dilly v. Barnard*, 8 G. & J. 170; *Andersen v. Roberts*, 18 Johns. 515; *Oreutt v. Orvis*, 3 Paige, 459; *Simpson v. Hart*, 1 Johns. Ch. 96; *Arden v. Patterson*, 5 Johns. Ch. 41; *Matson v. Field*, 10 Mo. 100; *Burton v. Hynson*, 14 Ark. 32; *Peck v. Strauss*, 33 Cal. 678; *Myers v. Overton*, 2 Abb. P. 344; *Hunter v. Lester*, 18 How. P. 337; *Haughey v. Wilson*, 1 Hilt. 259; *Kepp v. Fullerton*, 4 Minn. 473; *Cole v. Butler*, 43 Me. 401; *Hendrick v. Whittemore*, 105 Mass. 23; *Paine v. Moreland*, 15 Ohio, 435; *Beech v. Abbott*, 6 Vt. 586; *Williams v. Stewart*, 3 Wis. 773.

<sup>3</sup> *Koon v. Ivey*, 8 Rich. L. 37; *Kiser v. Winans*, 20 Ind. 428; *Bowen v. Bonner*, 45 Miss. 10; *Griswold v. Stewart*, 4 Cow. 459; *Dowling v. McGregor*, 91 Pa. St. 410; *Wright v. Sweet*, 10 Neb. 190.

in this class of proceedings are satisfaction of the judgment and want of jurisdiction. The original validity cannot be impeached.<sup>1</sup> Payment or part payment of the demand before the rendition of the judgment sought to be revived is inadmissible.<sup>2</sup>

§ 128. An application for a writ of mandamus is a separate or independent action, based upon the judgment rendered in some prior action, when used to enforce the collection of a judgment. It is the appropriate proceeding to compel municipal corporations to satisfy judgments rendered against them. In treating of mandamus in connection with the subject of estoppel, it is only in regard to this use of the writ to enforce judgments that it will be considered. When a proceeding in mandamus is used as an action at law to recover money, it is subject to the principles which govern money actions. Thus, in an action to recover upon municipal bonds, a denial of a writ of mandamus to compel a payment of such bonds, with an adjudication upon such denial that the bonds are invalid, is a former adjudication binding a purchaser of the bonds after due from the party instituting the mandamus proceedings.<sup>3</sup> So a judgment in favor of or against a city, county or State, as to the validity or invalidity of bonds, certificates, warrants, orders, etc., is as *res judicata*, a complete bar in an action of mandamus to compel the levy of a tax, or their payment.<sup>4</sup> And when upon the issue of law or fact a court of competent jurisdiction has adjudicated the merits of an application for mandamus or other prerogative writ, such adjudication is conclusive (except upon appeal) upon all courts.<sup>5</sup> So where a judgment has been rendered against a municipal corporation for any valid claim, and proceedings are commenced by man-

<sup>1</sup> Hopkins v. West, 83 Pa. 109; Morean, 23 La. Ann. 173; Godard v. Cordesa v. Hume, 6 S. & R. 55; Gray, L. R. 6 Q. B. 129.

<sup>2</sup> Camp v. Baker, 40 Ga. 148; Marriott v. Hampton, 7 T. R. 269.

<sup>3</sup> Louis v. Brown, 109 U. S. 162; Postmaster's Case, 12 Pet. 614; Block v. Commissioners, 99 U. S. 686; State v. Benson, 70 Ind. 481.

<sup>4</sup> Hartson v. Shanklin, 58 Cal. 248, Lyons v. Cooleedge, 89 Ill. 529.

<sup>5</sup> Santa Cruz v. Santa Clara, 62 Cal. 40.

<sup>1</sup> Hopkins v. West, 83 Pa. 109; Cordesa v. Hume, 6 S. & R. 55; Kanke v. Herrum, 48 Ia. 276; Lysle v. Williams, 15 S. & R. 135; Dowling v. McGregor, 91 Pa. 410; Bradford v. Rice, 102 Mass. 472; Thompson v. Hewitt, 6 Hill, 255; McDaniel v. Gardner, 34 La. Ann. 340; Folger v. Slaughter, 33 La. Ann. 342; Hammett v. Sprowl, 31 La. Ann. 362; Marbury v. Pace, 30 La. Ann. 1330; McStea v. Rotchford, 29 La. Ann. 69; Drogu v.

damus to compel the levy of a tax to pay the judgment, the regularity of the proceedings on which the judgment was rendered, or the validity of a judgment, cannot be contested.<sup>1</sup> Upon the same principle the discharge of a rule to show cause why a judgment plaintiff in ejectment should not be enjoined from issuing a writ of hab. fa. poss., owing to the defendant's failure to comply with the conditions of tenure imposed by the verdict, held *res adjudicata*, and an injunction to be properly refused.<sup>2</sup>

<sup>1</sup> *Louis v. Trustees*, 100 U. S. 163; *in re*, 124 Mass. 190; *State v. Benson*, *Huntington v. Smith*, 25 Ind. 486; 70 Ind. 481.

*Buell v. Trustees*, 11 Barb. 602; *State v. Beloit*, 20 Wis. 79; *Williams v. Sidmouth*, L. R. 2 Exch. 284; *Gorman*

<sup>2</sup> *Gordinier's Appeal*, 89 Pa. St. 523.

## CHAPTER III.

## PERSONAL JUDGMENTS; OR, JUDGMENTS BETWEEN PARTIES

SECTION 129. In a preceding chapter we have seen the distinction between judgments *in rem* and *in personam*, and as the latter class of judgments are by far the most extensive of the two, estoppel, in its application to personal judgments, or judgments between parties, will now be considered. The great distinction is in this fact, that while a judgment *in rem* (which will hereafter be fully treated) is conclusive upon the whole world, a judgment *in personam* or *inter partes* is conclusive only upon parties to the proceedings and their privies. The fundamental principle of law upon which this branch of the doctrine of estoppels is founded, and which in law governs it to a great extent, is *res inter alios acta alteri nocere non debet*, which, in effect, is to prevent a litigant party from being estopped, or even affected, by the evidence, acts, conduct, or declaration of strangers; and, as a general principle, it may be stated as one thoroughly well settled, that a transaction between two parties should not be binding upon third parties or strangers; for it would be inflicting great wrong and injustice to conclude and bind parties who could not be allowed to make a defense, or permitted to examine witnesses, adduce any testimony, or to appeal from a judgment that they might deem erroneous; and for this reason the depositions of witnesses in another action in proof of a fact, the verdict of the jury finding the fact, and the judgment of the court upon the facts found; while evidence of the most conclusive kind against the parties, and all claiming under and through them, cannot, generally, be used to the prejudice of strangers.<sup>1</sup> The

<sup>1</sup> King v. Norman, 4 C. B. 897; 511; Manigault v. Deas, 1 Bail. Eq. Duchess of Kingston Case, 20 How. 283; Buford v. Rucker, 4 J. J. Marsh. St. T. 578; McCall v. Harrison, 1 551; Brown v. Wyncoop, 2 Blackf. Brock. 126; Bailey v. Robinson, 1 230; Beers v. Broome, 4 Conn. 247. Gratt. 4; Leop v. Summers, 8 Rand. Brock v. Garrett, 16 Ga. 481; Mackay

principle upon which judgments are held conclusive upon the parties, requires that the rule should apply only to that which was directly in issue, and not to everything which was incidentally brought into controversy during the trial.<sup>1</sup> The evidence must correspond with the allegations, and be confined to the point in issue. It is only to the material allegations of one party that the other can be called to answer; it is only upon such that an issue can properly be formed; to such alone can testimony be regularly adduced; and upon such an issue only is judgment to be rendered. A record, therefore, is not held conclusive as to the truth of any allegations which were not material nor traversable; but as to things material and traversable, it is conclusive and final.<sup>2</sup>

§ 130. The celebrated judgment of Chief Justice De Gray, expressing the unanimous opinion of the judges in the great English case of the *Duchess of Kingston*, is cited as the leading authority in every case where this branch of estoppel is applicable, and it so clearly and comprehensively defines the principles applicable to the subject under consideration, that as a leading example of the foundation of the doctrine, it may be well to quote a greater portion of it. The Chief Justice said: "What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third. From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true. First, that a judgment of a court of concurrent jurisdiction, directly upon the point, IS AS A PLEA, A BAR, AS EVIDENCE CONCLUSIVE, between the same parties, upon the same

*v. Coates*, 70 Pa. 350; *Smith v. Turner*, 1 Hugh. 373; *Samuel v. Agnew*, 50 Ill. 553; *Rice v. Coolidge*, 121 Mass. 393; *Gaunt v. Wainman*, 3 Bing. N. C. 69; *Mays v. Compton*, 13 Ga. 269.

<sup>1</sup> *Bougher v. Scobey*, 21 Ind. 365; *Devoe v. Halstead*, 16 Ind. 287; *Horton v. Hamilton*, 20 Tex. 606; *Providence v. Adams*, 11 R. I. 190; *Hopkins v. Lee*, 6 Wheat. 109; *R. R. Co. v. Griffith*, 76 Va. 913.

<sup>2</sup> *Danaher v. Prentiss*, 22 Wis.

341; *Aurora v. West*, 7 Wall. 82; *Duncan v. Holcomb*, 26 Ind. 378; *Boston v. Haynes*, 33 Cal. 31; *Latriell v. Dorleque*, 35 Mo. 233; *Johnson v. Kerkhoff*, 35 Mo. 191; *Wildes v. Russell*, L. R. 1 C. P. 723; *Huffer v. Allen*, L. R. 2 Exchq. 15; *Sharkey v. Evans*, 46 Ind. 472; *McSweeney v. Carney*, 73 Ind. 430; *Krutzing v. Brown*, 73 Ind. 466; *Axtel v. Chase* 83 Ind. 546.

matter directly in question in another court. Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." This principle has been universally recognized in this country.<sup>1</sup>

- <sup>1</sup> *Crum v. Boss*, 48 Iowa, 233; *Ihm- sen v. Ormsby*, 32 Pa. 198; *Tams v. Lewis*, 42 Pa. 402; *Lentz v. Wallace*, 17 Pa. 412; *Waugh v. Morrison*, 55 N. H. 580; *King v. Chase*, 15 N. H. 9; *Carter v. James*, 13 M. & W. 137; *Blackburn's Case*, 1 Salk. 290; *Jones v. Lavender*, 55 Ga. 228; *Clark v. Bryan*, 16 Md. 171; *Hobb v. Parker*, 31 Me. 143; *Burt v. Sternberg*, 4 Cow. 559; *Wood v. Jackson*, 8 Wend. 1; *Young v. Black*, 7 Cranch, 565; *Wright v. Butler*, 6 Wend. 284; *Laurence v. Hunt*, 10 Wend. 80; *Eastman v. Cooper*, 15 Pick. 276; *Embury v. Conner*, 3 N. Y. 511; *Beall v. Pearce*, 12 Md. 550; *Ridgeley v. Stillwell*, 27 Mo. 128; *Chamberlain v. Carlisle*, 26 N. H. 540; *Davenport v. Barnett*, 51 Ind. 329; *Potter v. Baker*, 19 N. H. 166; *Raborg v. Hammond*, 2 H. & G. 42; *Barney v. Patterson*, 6 H. & J. 182; *Fishwick v. Terrell*, 4 H. & J. 394; *Ranoul v. Griffie*, 3 Md. 60; *Outram v. Morewood*, 3 East, 345; *Gardner v. Buckbee*, 3 Cow. 120; *Peay v. Duncan*, 20 Ark. 85; *Hibshman v. Dulleban*, 4 Watts, 183; *Gist v. Davis*, 2 Hill Ch. 335; *Love v. Truman*, 10 Ohio St. 45; *Wales v. Lyon*, 2 Mich. 276; *Cecil v. Cecil*, 19 Md. 72; *Gray v. Dougherty*, 25 Cal. 272; *Caperton v. Schmidt*, 26 Cal. 493; *Garwood v. Garwood*, 29 Cal. 521; *Gahan v. Maingay*, 12 T. R. 54; *Croudson v. Leonard*, 4 Cranch, 436; *R. v. Knaptoft*, 2 B. & C. 883; *Haight v. Keokuk*, 4 Iowa, 199; *Fish v. Lightner*, 44 Mo. 268; *Reed v. Allen*, 56 Tex. 182; *Lee v. Kingsbury*, 13 Tex. 68; *Roberts v. Johnson*, 48 Tex. 133; *Roberts in re*, 19 S. C. 150; *Hart v. Bates*, 17 S. C. 40; *Spicer's Case*, 5 Ct. of Claims, 35; *Shrewsbury's Case*, 9 Ct. of Claims, 263; *Tillon's Case*, 1 Ct. of Claims, 220; *Gilheath v. Jones*, 66 Ala. 129; *McCrary v. Remson*, 19 Ala. 430; *Miller v. Jones*, 29 Ala. 174; *Chamberlain v. Gaillard*, 26 Ala. 504; *Ford v. Ford*, Ala. 141; *R. R. v. Griffith*, 76 Va. 913; *Hopkins v. Lee*, 6 Wheat. 109; *Kelly v. Board*, 25 Gratt. 755; *Tilson v. Davis*, 32 Gratt. 92; *Hart v. Bates*, 17 S. C. 35; *Read v. Allen*, 56 Tex. 182; *Roberts v. Johnson*, 48 Tex. 133; *Tadlock v. Eccles*, 20 Tex. 782; *Lore v. Truman*, 10 Ohio St. 45; *Grump v. Thomas*, 85 N. C. 272; *Lewis v. Sloane*, 68 N. C. 557; *Gay v. Stancill*, 76 N. C. 369; *Sanderson v. Peabody*, 58 N. H. 116; *Cooper v. Corbin*, 105 Ill. 224; *Thacher v. Gammon*, 12 Mass. 268; *Baxter v. Ins. Co.*, 6 Mass. 279; *Smith v. Whiting*, 11 Mass. 446; *State v. Ramsburg*, 43 Md. 325; *Brunner v. Ramsburg*, 43 Md. 550; *Aurora v. West*, 7 Wall. 82; *Kilheffer v. Herr*, 17 S. & R. 319; *Marsh v. Pier*, 4

§ 131. A much more conclusive effect is given to judgments of courts of *exclusive* jurisdiction than to the judgments of courts which have only *concurrent* jurisdiction. With regard to *the parties*, between whom they are to be used, and the *matter* to which they relate, these two classes of judgments are put upon the same footing, and subject to the same limitation and restriction; the *subject-matter* must be identical; and the *parties* also the same. There is a vast difference in the two classes of judgments in reference to the *occasion* and *manner* in which it is proposed to use them. It is only upon a matter *directly in question* that a judgment of the court of *concurrent* jurisdiction is conclusive—while the judgment of a court of *exclusive* jurisdiction is conclusive, not only when the matter comes directly in question, but also when it comes *incidentally* in question. This difference with regard to effect of the conclusiveness of judgments, results from the difference in the constitution of the tribunals which pronounce them. When a matter, over which some other tribunal is permitted to have exclusive jurisdiction, comes directly or incidentally in question, and the judgment of that court is offered in evidence as proof of the matter, it must necessarily be *conclusive*; implicit credit must be given to a court so constituted, while its judgment is in full force and unreversed; for the court in which the particular matter is to be proved, has no authority to examine into the merits of the judgment, but must take the matter as judicially and conclusively decided.

§ 132. The United States courts are courts of limited jurisdiction; yet they are not inferior courts, and their judgments and decrees have the same conclusive effect as all other judgments until reversed or annulled; and so conclusive is the effect of their judgments, that after the term of court at which they were rendered they cannot be set aside or revoked. Their power

Rawle, 273; Bissell v. Kellogg, 60 Ba. b. 617; Sherman v. Dilley, 3 Nev. 21; State v. R. R. Co., 10 Nev. 79; McLeod v. Lee, 17 Nev. 103; Doty v. Brown, 4 N. Y. 71; Spencer v. Dearth, 43 Vt. 104; Smith v. Kernochen, 7 How. 198; Gardner v. Buckbee, 3 Cow. 120; Beebe v. Elliott, 4 Barb. 457; Bouchard v.

Dias, 3 Denio, 238; Burt v. Sternburgh, 4 Cow. 559; Bank v. Rude, 23 Kas. 143; Clark v. Rowling, 3 N. Y. 220; Peareth v. Marriott, 22 Ch. D. 182; Williams v. Davies, 11 Q. B. D. 74; *Defries in re*, 48 L. T. 703; Brunsden v. Humphrey, 11 Q. B. D. 712; Henry v. Davis, 13 W. Va. 230.

over the subject-matter has gone, and the only remedy is that of appeal; and they are of such a binding effect that although the record does not show any jurisdiction,<sup>1</sup> the rights of third parties dependent upon it cannot be in any way impaired in any collateral proceedings as long as the judgment is unreversed or unannulled.

§ 133. A controversy once determined, resulting in a final judgment upon the merits, by a tribunal having jurisdiction of the person and the subject-matter of the action, is conclusive of the cause of action and all the essential facts in said action against the parties, their personal representatives, assignees and privies in every other tribunal, and not only concludes such parties and their privies in a subsequent action based upon the same cause or causes, but in any action that may be instituted between them and their privies.<sup>2</sup>

<sup>1</sup> McCormack v. Sullivant, 10 Wheat. 192; Watkins *ex parte*, 3 Pet. 193; Kennely v. Bank, 8 How. 586; Huff v. Hutchinson, 14 How. 386.

<sup>2</sup> Webb v. Buckalew, 82 N. Y. 555; Demarest v. Darg, 32 N. Y. 291; Balkum v. Satcher, 51 Ala. 81; Hendrickson v. Norcross, 10 N. J. E. 417; Baldwin v. McCrac, 38 Ga. 659; Jordan v. Faircloth, 34 Ga. 47; Sergeant v. Ewing, 36 Pa. St. 156; Eimer v. Richards, 25 Ill. 289; Kelly v. Donlin, 70 Ill. 378; Garwood v. Garwood, 29 Cal. 514; French v. Howard, 14 Ind. 455; State v. Ramsburg, 43 Md. 325; De Proix v. Sargent, 70 Me. 266; Smith v. Way, 9 Allen, 472; Adams v. Cameron, 40 Mich. 506; Walker v. Mitchell, 18 B. Mon. 541; Wixon v. Stephens, 17 Mich. 518; Stewart v. Dent, 24 Mo. 111; Babcock v. Camp, 12 Ohio St. 11; Shuttlesworth v. Hughey, 9 Rich. 38.; Bell v. McCullough, 31 Ohio St. 397; Tilson v. Davis, 32 Gratt. 92; Cabot v. Washington, 41 Vt. 168; Western v. Coal Co., 10 W. Va. 250; Hopkins v. Lee, 6 Wheat. 109; Allie v. Schmitz, 17 Wis. 169; Tubal Cam, The, 9 F. R.

834; Heath v. Frackelton, 20 Wis. 320; R. R. Co. v. R. R., 20 Wall 137; Aurora v. West, 7 Wall. 82; Goodrich v. Chicago, 5 Wall. 566; Beloit v. Morgan, 7 Wall. 619; Queen v. Hutchins, 6 Q. B. D. 300; Russell v. Place, 94 U. S. 606; Flanigan v. Thompson, 9 F. R. 177; Campbell v. Rankin, 99 U. S. 263; Cromwell v. Sac, 94 U. S. 351; Davis v. Brown, 94 U. S. 423; Miles v. Caldwell, 2 Wall. 35; Bank v. Beverly, 1 How. 181; Corcoran v. Canal Co., 94 U. S. 744; Hill v. Bank, 97 U. S. 450; Montgomery v. Sarmony, 99 U. S. 492; Russell v. Fairquhar, 55 Tex. 355; Sewell v. Watson, 31 La. Ann. 589; Witheebee v. Storvel, 23 Hun, 27; Preble v. Supervisors, 8 Biss. 358; Schrauth v. Bank, 8 Daly, 166; Timon v. Whitehead, 58 Tex. 290; Chandler's Appeal, 100 Pa. St. 262; Morris v. Gentry, 89 N. C. 248; Hieroman v. Louisiana, 34 La. Ann. 805; Walsh v. Agnew, 12 Mo. 520; Bradford v. Folsom, 3 Fed. R. 199; Belcher Co. v. Deterani, 62 Cal. 160; Goodenow v. Litchfield, 59 Iowa, 226; Frazer v. City Council, 19 S. C. 584; Doyle v. Reilly, 18 Iowa, 108;

§ 134. The effect of *res judicata* as a bar to a renewal of the former action applies only to the parties to the judgment, it gives no right to or against third parties — *res inter alios judicata*.

Painter v. Hogue, 49 Iowa, 426; Louis v. Brown, 109 U. S. 167; Grinnet v. Henderson, 60 Ala. 54; McWilliams v. Kalbach, 57 Iowa, 110; Donnie v. Smith, 129 Mass. 143; State v. Gorman, 75 Mo. 370; Cooley v. Warren, 53 Mo. 166; Girardin v. Dean, 49 Tex. 243; Garner v. State, 23 Kas. 790; McWilliams v. Morrell, 23 Hun, 163; Matthews v. Green, 12 Phila. 341; Thompson v. Blanchard, 2 Lea, 528; Tuttle v. Harrill, 85 N. C. 456; Trescott v. Barnes, 51 Iowa, 109; Price v. Dewey, 6 Sawyer, 493; Mison v. Buchtel, 101 U. S. 638; Renick v. Ludington, 20 W. Va. 511; Cemetery Co. v. People, 92 Ill. 619; R. R. Co. v. Bank, 102 U. S. 14; Krull v. Lippey, 56 Wis. 292; Tuttle v. Blockway, 32 Pa. St. 45; Holson v. Caldwell, 1 Lea, 48; Campbell v. Goodhall, 8 Ill. App. 206; Freeman v. Rahm, 58 Cal. 111; Signon v. Hawn, 86 N. C. 310; Devin v. Ottumwa, 53 Iowa, 561; Sheridan v. Andrews, 49 N. Y. 478; Sharp v. Lumley, 34 Cal. 611; Horn v. Jones, 28 Cal. 194; Denver v. Lohenstein, 3 Col. 206; Lawrence v. Milwaukee, 45 Wis. 306; Devegge v. Devegge, 33 La. Ann. 689; Norman v. Burnes, 67 Ala. 248; Ludd v. Durkin, 54 Cal. 395; Croft v. Johnson, 8 Baxt. 350; Gill's case, 7 Ct. Claims, 593; Dunham v. Wilfong, 69 Mo. 355; Cooper v. Platt, 45 N. Y. Super. 212; Timon v. Whitehead, 58 Tex. 290; R. R. Co. v. Schwartz, 13 Ill. App. 490; Doolittle v. Den Mans, 34 Ill. 457; Lumber Co. v. Bechtel, 101 U. S. 638; Caujolle v. Ferrie, 13 Wall. 465; Lebrew's Succession, 31 La. Ann. 212; Parrish v. Ferris, 2 Black, 606; Rougher v. Scobey, 21 Ind. 365; Society, &c. v. Hartland, 2 Paine, 536; Cleveland, &c. Co. v. Erie, 1 Grant's C. S. 212; Gilbert v. Thompson, 9 Cosh. 348; Shuster v. Perkin, 2 Jones L. 247; Gay v. Stancel, 36 N. C. 39; Ann. field v. Moore, 4 B. & B. 157; Ward v. Ward, 2 N. J. L. 690; White v. Steam, &c. Co., 6 Cal. 462; Parry v. Atley, 4 W. Va. 22; Room v. Lee, 8 R. & L. 37; Whitehurst v. Boates, 23 Md. 503; People v. San Francisco, 27 Cal. 655; State v. Baldwin, 31 Mo. 561; Jackson v. Louisa, 16 Cl. L. 28; Lins v. Mills, 28 Tex. 584; Vincent v. Rogers, 33 Ala. 221; Peale v. Rauth, 13 La. Ann. 251; Vincent v. Moore, 36 Mo. 92; Burns v. Milwaukee, &c. Co., 9 Wis. 479; Whitaker v. Johnson, 12 Iowa, 595; Burns v. Dodge, 9 Wis. 458; Cincinnati, &c. Co. v. Wymoe, 16 Ind. 285; Hill v. Hoover, 9 Wis. 15; Keri v. Bank, 18 Md. 396; Bank v. Edwards, 10 Gray, 287; Banker v. Tufts, 57 Me. 417; Baker v. Cleveland, 19 Mich. 230; Boetum v. Schenck, 41 N. Y. 182; May or v. Foley, 40 Cal. 281; Ballard v. Appleton, 26 Wis. 67; Sparhawk v. Hills, 5 Gray, 423; Betts v. R. R., 43 Iowa, 602; Bruner v. Ramsburg, 43 Md. 565; Whitman v. Heucherry, 73 Ill. 169; Cigaret v. Sines, 25 N. H. 402; Western, &c. Co. v. Virginia, &c. Co., 10 W. Va. 250; Hughes v. U. S., 4 Wall. 232; Todd v. Stewart, 9 Q. B. 759; Bagot v. Williams, 3 B. & C. 235; Phillips v. Berick, 16 Johns. 137; Briscoe v. Lloyd, 64 Ill. 33; Thoma-son v. Odum, 31 Ala. 108; Castellaw v. Guilmartin, 54 Ga. 299; Pickens v. Yamborough, 30 Ala. 408; Turnpike Co. v. Supervisors, 62 Cal. 40; Hous-ington v. Brakey, 31 Kas. 560; Tracy v. Shumate, 22 W. Va. 471; Roberts *in re*, 19 S. C. 150; State v. Judge, 35

*tae, neque emolumentum afferre his qui iudicio non interfuerunt, neque prejudicium solent irro gare.*" "*Saepe constitum est, res inter alios iudicatas aliis non praejudicare.*" In order to apply this principle it is necessary to ascertain what persons are considered as the same parties. So that the judgment is to be held conclusive between them and between what persons on the other hand the judgment is to be regarded as *res inter alios iudicata* for which no right can ensue for or against them.

§ 135. In regard to the term parties, as used in connection with the doctrine of estoppel, the law includes all who are distinctly interested in the subject-matter of the suit and had a right to make defense or to control the proceedings, and to appeal from the judgment, the right to adduce testimony and to cross-examine the witnesses adduced on the other side, and to appeal from the decision, if an appeal lies, only those who have enjoyed these privileges, collectively, should be concluded, by a decision, judgment or decree. Persons not having these rights are regarded as strangers to the record.<sup>1</sup> If parties to a suit are bound, natural justice requires that all persons claiming under or through them should also be concluded, for there is a mutuality of interest between parties and their privies; one of the general rules is, that estoppels ought to be reciprocal or mutual, it is therefore well settled that no record of a conviction or verdict can be used as an estoppel unless in cases where the benefit is mutual,<sup>2</sup> that

La. Ann. 214; Randall v. District, 63 Cal. 30; Beames v. Beames, 66 How. Pr. 456; Norris v. State, 51 Mich. 621; Tibbitts v. Shapleigh, 59 N. H. 319; Corker v. Jones, 110 U. S. 317; Luce v. Dexter, 135 Mass. 23; Patrick v. Shaffer, 94 N. Y. 423; Storm v. Emantrout, 89 Ind. 214; Cleveland v. Creviston, 93 Ind. 31; S. C., 47 Am. R. 367; Aultman v. Mount, 62 Iowa, 674.  
<sup>1</sup> Greenleaf Ev. § 524; Cecil v. Cecil, 19 Md. 72; Wright v. Hazen, 24 Vt. 143; Harris v. Plant, 31 Ala. 639; Simpson v. Pearson, 31 Ind. 1; Huntington v. Jewett, 28 Iowa, 249; Bradford v. Bradford, 5 Conn. 127; Edwards v. McCurdy, 13 Ill. 496.

<sup>2</sup> Simpson v. Pearson, 31 Ind. 1; Chope v. Loman, 20 Mich. 327; Chandler's App, 100 Pa. St. 262; Towsley v. Johnson, 1 Neb. 95; Doe v. Errington, 6 Bing. N. C. 79; Wenman v. McKenzie, 5 E. & B. 447; Carter v. Bennett, 4 Fla. 353; Campbell v. Phelps, 1 Pick. 62; Castle v. Noyes, 14 N. Y. 329; Petrie v. Nuttal, 11 Exchq. 569; Gwynn v. Hamilton, 29 Ala. 233; Bell v. Hoagland, 29 Ala. 233; Meyers v. Johnson, 14 Iowa, 47; Chamberlain v. Carlisle, 26 N. H. 540; Bradley v. Johnson, 49 Ga. 412; Groshorn v. Thomas, 20 Md. 234; Simpson v. Jones, 2 Sneed, 36; Crabbe v. Larkin, 9 Bush, 154; Manf. Co. v.

is, such as might have been given in evidence by either of the parties to the action; and in Gilbert on evidence it is laid down that nobody can take benefit by a verdict who had not been prejudiced by it, had it gone contrary, and this seems to be the settled rule.

§ 136. Estoppels, like all other branches of law, are founded upon certain fundamental principles or rules. In their application to parties, privies and strangers as regards their conclusive effect, the maxim of *res inter alios acta* is one of the fundamentals applicable in regard to strangers. The judgment in the case of the Duchess of Kingston declared that a record was conclusive between the same parties; and in Buller's *Nisi Prius*, the reason for the rule of conclusiveness between parties and those claiming under and through them, and that parties not so connected with the subject-matter of the controversy were not so bound, is thus stated: The verdict ought to be between the parties, otherwise a man might be bound by a decision, who had not the liberty to cross-examine; and nothing can be more contrary to natural justice than that a man should be injured by a determination that he, or those under whom he claims, was not at liberty to controvert.<sup>1</sup> It would be unjust that such proceedings should be evidence against strangers. Numerous reasons might be given for this rule, one of which might be, that if the stranger had been a party to the action, in place of the party who recovered judgment, the result might have been different; as the parties were different, there is every reason to believe that the evidence would have been, part of which may have been inadmissible and part uncertain, or evidence of a totally different character might have been introduced by the unsuccessful party, which would have changed the result. To give such a judgment the effect of an estoppel, would be giving a party the benefit of testimony which he might be allowed to introduce in an action, in which he was a party or directly interested. The principal reason other than those given is, that all estoppels must be mutual, and this is the reason that regularly a stranger shall neither be

Price, 4 Rich. 338; Daniels v. Henderson, 49 Cal. 245; Atlantic Co. v.

<sup>1</sup> Bull. N. P. 233; Com. Dig. Est.; Co. Litt. 352; Gaunt v. Wainman, 3 Bing. N. C. 69.

bound by, nor take an advantage of an estoppel, and it must be conceded that it would be a hardship were it otherwise; but the converse of this rule is equally true, that by proceedings to which he was not a stranger he may well be bound, for there would be no injustice in such a case.

§ 137. The maxim "*qui sentit commodum sentire debet et onus*," is applicable in support and as particularly explanatory of this branch of the law of estoppel, in accordance with which the record of a verdict followed by a judgment *inter partes* will estop not only the original parties, but those also who claim under them. A man will be bound by that which bound those under whom he claims *quoad* the subject-matter of the claim, for he who derives the benefit from a thing ought to sustain the burden, or feel the disadvantages attending it. And no man, except in certain cases, which are regulated by the statute law and law merchant, can transfer to another, a better right than he himself possesses. The grantee shall not be in a better condition than he who made the grant, and, therefore, privies in blood, law and estate shall be bound by and take advantage of estoppels.<sup>1</sup> In order to give full effect to the rule by which parties are held estopped by a judgment, all persons who are represented by the parties or claim under them or in privity with them are as equally and as effectually estopped by the same proceedings.<sup>2</sup>

<sup>1</sup> Locke v. Norborne, 3 Mod. 141; Whittaker v. Jackson, 2 H. & C. 926; Outram v. Morewood, 3 East, 346.

<sup>2</sup> Griswold v. Jackson, 2 Edw. Ch. 461; Gest v. Flock, 2 N. J. Eq. 108; Legrand v. Francisco, 3 Munf. 83; Cruger v. Daniel, Riley Ch. 103; Masterson v. Marshall, 5 Dana, 413; Johnston v. Churchill, 6 Litt. 177; Head v. Perry, 1 Monr. 253; Prentice v. Buxton, 3 B. Mon. 35; Waring v. Reynolds, 3 B. Mon. 59; Redmond v. Coffin, 2 Dev. Eq. 443; Wood v. Davis, 7 Cranch, 271; Simpson v. Jones, 2 Sneed, 36; Manigault v. Deas, 1 Bail. 283; Burgess v. Lane, 3 Me. 165; Doe v. Prettyman, 1 Houst. 334, Lothrop v. Southworth, 5 Mich.

430; McCalla v. Patterson, 18 B. Mon. 201; Ferguson v. Glaze, 12 La. Ann. 667; Flandraw v. Downey, 23 Cal. 354; Brady v. Spurck, 27 Ill. 478; Maple v. Beach, 43 Ind. 51; Spencer v. Williams, L. R. 2 P. & D. 230; Clink v. Thurston, 47 Cal. 21; Larum v. Wilmer, 35 Ia. 244; Warner v. Trow, 36 Wis. 195; Verner v. Carson, 66 Pa. St. 440; Wenman v. McKenzie, 5 E. & B., 447; Doe v. Errington, 6 Bing. N. C. 79; Timon v. Whitehead, 58 Tex. 290; R. R. Co. v. Schwartz, 13 Ill. App. 490; Pollard v. R. R., 101 U.S. 223; Neumeister v. Dubuque, 47 Iowa, 465; Mundorf v. Wickersham, 63 Pa. St. 871; Ins. Co. v. Woodworth, 83 Pa. St. 223; Finney v. Boyd, 26 Wis. 366; Stoddard v.

§ 138. In order to make a judgment conclusive on parties they must be adversary parties in the original action. Thus, a judgment against A. and his sureties is no bar in an action between one surety and his co-sureties to recover of each his proportionate share of a judgment of amercement that had been collected of him; while it establishes the demand, it does not establish the liability of the sureties between themselves, that point is not before the court in the action wherein the original judgment was rendered.<sup>1</sup> The language of a decree must be construed in reference to the issue which is put forward by the prayer for relief and other pleadings, and which these show it was meant to decide. Hence, though the language may be very broad and emphatic, enough so, perhaps, when taken in the abstract merely, to include the decision of questions between co-defendants, yet where the pleadings including the prayer for relief are not framed in the way usual in equity, when it is meant to bring the respective claims and rights of co-defendants before the court, but are framed as in a controversy between the complainant and defendant chiefly or only, such general language will be held down to these two principal parties only.<sup>2</sup>

§ 139. A personal judgment or a judgment between parties not only binds the parties but those claiming under or through the parties. Therefore such judgments conclude, viz :

1st. PARTIES and

2d. PRIVIES thereto.

The term privy used in this connection denotes mutual succession or relationship to the same rights of property.<sup>3</sup> Persons

Thompson, 31 Iowa, 80; Shelton v. Brown, 22 La. Ann. 162; National Bank v. Sprague, 21 N. J. Eq. 530; Doyle v. Peckham, 9 R. I. 21; Wickliffe v. Bascom, 7 B. Mon. 681; Cecil v. Cecil, 19 Md. 72; Craig v. Ward, 1 Abb. N. Y. App. 454; Fogarty v. Sparks, 22 Cal. 142; Brewster v. Gauss, 37 Mo. 518; Gray v. Gillilan, 15 Ill. 453; Donald v. Gregory, 41 Iowa, 513; Stoddard v. Burton, 41 Iowa, 582; Groesbeck v. Ferguson, 43 Iowa, 532; R. R. Co. v. Wynne, 14 Ind. 385; Stoutemore v. Clark, 70

Mo. 471; Wilson v. Daval, 5 Bosw. 619; Nonis v. Ins. Co., 51 Mich. 621.

<sup>1</sup> Duncan v. Holcomb, 26 Ind. 373, McCrary v. Parks, 18 Ohio St. 1; Cox v. Hill, 13 Ohio, 411; Buffington v. Cook, 35 Ala. 312.

<sup>2</sup> Graham v. R. R. Co., 2 Wall. 704; Torrey v. Pond, 102 Mass. 355.

<sup>3</sup> R. R. Co. v. Wynne, 14 Ind. 385; Springport v. Bank, 75 N. Y. 397, Raymond v. Richmond, 78 N. Y. 351, Goodman v. Niblack, 102 U. S. 556; Machine Co. v. Barnard, 43 Mich.

standing in this relation to the litigating party are bound by the proceedings to which he was a party, and the reason for this rule is, that they are identified with him in interest, and whenever this sameness is found to exist, all are alike estopped. Hence all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity.<sup>1</sup> Lord Coke divides privies into three classes:

1. Privies in blood.
2. Privies in law.
3. Privies by estate.

A man becomes a privy whenever he agrees to be bound by the acts of a third person; and where one agrees to be bound by the result of a judicial proceeding, as against a stranger or third person, under such circumstances that others have the right to insist on the fulfillment of his agreement, he will not be permitted to recede from his promise after the rendition of the judgment, to their injury.<sup>2</sup>

§ 140. A privy in blood, as for example an heir, would be estopped by a verdict against his ancestor through whom he claims, and may take advantage of judgment in favor of an an-

379; *McDonald v. Gregory*, 41 Iowa, 513; *Hine v. R. R.*, 42 Iowa, 636.

<sup>1</sup> *Carver v. Jackson*, 4 Pet. 85; *Chapin v. Curtis*, 23 Conn. 388; *Emery v. Fowler*, 39 Me. 326; *Key v. Test*, 14 Md. 86; *Case v. Reeve*, 14 Johns. 81; *Kinnersley v. Orpe*, 2 Doug. 517; *Doe v. Derby*, 1 A. & E. 790; *Rex v. Blakemore*, 2 D. C. C. 410; *Winslow v. Grindall*, 2 Me. 64; *Gavin v. Graydon*, 41 Ind. 559; *Adams v. Barnes*, 17 Mass. 335; *Shufeldt v. Shufeldt*, 9 Paige, 137; *Varick v. Edwards*, 11 Paige, 289; *Griffith v. Griffith*, 2 Harr. 5; *Parrish v. Ferris*, 2 Black, 606; *Greely v. Smith*, 1 W. & M. 181; *Sturdy v. Jackway*, 4 Wall. 174; *Castle v. Noyes*, 14 N. Y. 329; *Peterson v. Lothrop*, 34 Pa. 223; *Burton v. Wilkinson*, 18 Vt. 186; *Hendrickson v. Nor-*

*cross*, 19 N. J. Eq. 417; *Peale v. Routh*, 13 La. Ann. 254; *McKinzie v. Baltimore*, 21 Md. 161; *Lawrence v. Milwaukee*, 42 Wis. 342; *Loomis v. Riley*, 24 Ill. 307; *Milican v. Milican*, 24 Tex. 426; *Tallman v. McCarty*, 11 Wis. 401; *Archibald v. Davis*, 4 Jones L. 133; *Jackson & Co. v. Holland*, 14 Fla. 384; *Douglas v. Scott*, 5 Ohio, 194; *Connover v. Porter*, 14 Ohio S. 450; *Cuttle v. Brockway*, 32 Pa. 45; *Stoutemore v. Clark*, 70 Mo. 471.

<sup>2</sup> *Towle v. Towle*, 40 N. H. 432; *Gelston v. Whitesides*, 5 Cal. 309; *Miller v. Elliott*, 9 Ind. 484; *Church v. Barker*, 18 N. Y. 463; *Brown v. Sprague*, 5 Denio, 545; *Patten v. Caldwell*, 1 Dall. 419; *Krall v. Libbey*, 53 Wis. 292.

cestor.<sup>1</sup> Coke gives as instances of privy in law, lord by escheat, tenant by curtesy, tenant in dower, the incumbent of a benefice, and others that come in by act of law or in the *post*.<sup>2</sup> An executor or administrator, suing as such, will be bound by a verdict against his testator or intestate to whom he is privy in law.<sup>3</sup> One of the leading cases in which the doctrine of estoppel by a judgment *inter partes* in regard to privies is laid down, is the celebrated English case of *Ontram v. Morewood*, repeated in 3d East, page 125, and was decided by Lord Ellenborough, Chief Justice: “The question in that case,” said the learned judge, “is whether the defendants, the husband and wife, are estopped by this verdict, and judgment from averring, contrary to the title there found against the wife.” The operation and effect of this finding, if it operates at all as a conclusive bar, must be by way of an *estoppel*. If the wife were bound by this finding, as an estoppel, and precluded from averring the contrary of what was then so found; the husband, in respect to his privy, either in estate or in law, would be equally bound, according to what is said in Co. Litt. 352. “Privies in estate, as the feoffee, lessee, etc.; privies in law, as the lord by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come in by act of law in the *post*, shall be bound by and take advantage of estoppels. The question then is: Is the wife herself estopped, by this former finding, to aver the contrary? In Brooke, tit. Estoppels, pl. 15, it is said to be agreed that all the records in which the freehold comes in debate shall be estopped with the land and run with the land, so that a man may plead this as a party, or as heir, as privy, or by *que estate*. But if it be said that by the freehold coming in debate must be meant a question respecting the same, in a suit in which the freehold is immediately recoverable, as in assize or in writ of entry, I answer, that a recovery upon any one suit in issue, joined on matter of title, is equally conclusive upon the subject matter of such title, and that a finding upon title in trespass not only operates as a bar to the future recovery, by way of damages for a trespass founded upon the same injury, but also operates by way of an estoppel to any action for an injury to the same supposed right

<sup>1</sup> Locke v. Norborne, 3 Md. 14.

<sup>2</sup> Rex v. Hebdon, And. 389.

<sup>3</sup> 2 Coke Litt. 352, b.

of possession." And in accordance with the well settled doctrine of estoppel, and "the reason and convenience of the thing, and the analogy to the rules of law in other cases, decided, *that the husband and wife, the defendants in this case, are estopped by the former verdict and judgment on the same point in the action of trespass, to which the wife was a party.*" This case is an example of the well settled principle, that a verdict negating the right of a defendant stated in his plea, estops<sup>1</sup> him in a subsequent action from asserting that right as plaintiff against the same party.

§ 141. In a late case Mr. Chief Justice Waite, of the United States Supreme Court, while on the circuit, decided that a judgment in an action of assumpsit, brought by a husband and wife, on a contract by a carrier of passengers to carry the wife safely, for injuries to the wife while being carried, is a bar to another action of assumpsit on the same contract, by the husband alone, to recover for the same injuries. A different rule prevails when the action is in tort against the carrier for a breach of his public duty, except perhaps in States like New Jersey, where by statute the husband may, in such an action, add claims in his own right to those of his wife.<sup>2</sup> And in an old English case it was decided that a judgment against a schoolmaster, concerning the rights of office, is evidence against his successor.<sup>3</sup> So, a judgment of *ouster* is conclusive in a *quo warranto* against a person claiming to have been admitted to a corporate office, by or through a party against whom the judgment was obtained.<sup>4</sup> But there is no privity between an executor or administrator and the

<sup>1</sup> Outram v. Morewood, 3 East, 346; Waid v. Wilkinson, 4 B. & A. 412; Simpson v. Pickering, 1 C. M. & R. 529; Eastmure v. Laws, 5 Bing N. C. 450, 465; Kochler v. Bernicker, 63 Mo. 368; Hawkins v. Lambert, 18 B. Mon. 99; Lindsay v. Daniel, 46 Vt. 144; Lee v. Kingsbury, 13 Tex. 68; Chilson v. Beeves, 29 Tex. 275; Webb v. Mallard, 27 Tex. 80; Tate v. Hunter, 3 Strobb. Eq. 136; Watson v. Bridge Co., 13 S. C. 433; Hart v. Bates, 17 S. C. 40; Lummev. v. Brady, 8 Iowa, 33; Lord v. Chaburne, 42 Me.

429; Neumeister v. Dubuque, 47 Iowa, 465; Butcher v. South, 10 Phila. 104; Pollard v. R. R. Co., 101 U. S. 223.

<sup>2</sup> Pollard v. R. R. Co., U. S. Cir. Ct. Dist. of N. J.; S. C. affirmed, 101 U. S. 223.

<sup>3</sup> Brounker v. Atkins, Skinn. 15; Berry v. Barnes, Peake, 156.

<sup>4</sup> Hait v. Harvey, 32 Barb. 55; Rex v. York, 5 T. R. 66; Rex v. Hebdon, 2 Stra. 1109; King v. Grimes, Bull. N. P. 231.

heir or devisee of all the land, and a judgment against the administrator or executor will not have that conclusive effect to charge the real estate of the heir or devisee.<sup>1</sup> So it was held that a decree for the specific execution of a covenant in a suit commenced by the covenantee, and afterwards revived in favor of his heirs, was no bar to an action brought by his administrator to recover damages for breach of the covenant, if the administrator was not made a party to the action of revivor; and the only relief the covenantor had from the double burden of executing the covenant and paying damages for the breach, was in resorting to a court of equity.<sup>2</sup> But, under the laws of New York, a judgment against an heir or devisee is an estoppel to a subsequent suit against an executor or administrator of the ancestor or devisee for the same debt or damage, unless it can be shown that the judgment against the heir and devisee is unsatisfied, or that sufficient property had not descended, or been devised, to the heir or devisee. A judgment against an heir or devisee for a debt or legacy expressly charged on the estate devised or descended, is an estoppel to any subsequent action against the executor or administrator for the same debt or legacy.<sup>3</sup> At common law there is no privity between an executor and administrator *de bonis non cum testamento annexo*, and a judgment recovered by the former will not bar a suit brought by the latter; and the rule is the same where an administrator recovers judgment and dies; this does not estop the succeeding administrator from bringing a new action.<sup>4</sup>

§ 142. There is no technical privity between an administrator in chief and a succeeding administrator *de bonis non*, and the acts or admissions of the former, and judgments against him, are neither conclusive nor admissible against the latter; yet an administrator *de bonis non* is bound and concluded by the rightful administration of his predecessor—by all acts done within the line of his duty and authority, which are not tainted with fraud;

<sup>1</sup> Deneale v. Stump, 8 Pet. 538.

<sup>2</sup> Combs v. Turlton, 5 Dana, 574.

<sup>3</sup> O'Brien v. Heeney, 2 Ed. Ch. 242;  
Hardaway v. Drummond, 27 Ga. 221;  
Moore v. Beauchamp, 5 Dana, 70;  
Poche v. Ledoux, 12 La. Ann. 350;

Manly v. Kidd, 33 Miss. 141; Pickens  
v. Yarbrough, 30 Ala. 408.

<sup>4</sup> Grant v. Chamberlain, 4 Mass. 64;  
Allen v. Irwin, 1 S. & R. 549; Barn-  
hurst v. Yelverton, Yelv. 83; Thayer  
v. Hollis, 3 Met. 369.

not only by all completed acts of administration, but by all matters of evidence that would affect creditors, legatees and distributees.' Where a party is sued in his official capacity, as administrator of an estate, in which he is interested as heir or devisee, and his personal matters, as well as his official ones, are in issue and determined, he is personally bound by the judgment.<sup>2</sup>

§ 143. Privies in an estate are where there is a mutual or successive relationship as to rights, as in the case of lessor and lessee, donor and donee, joint tenants, persons who have an interest in an estate created by another; a person may be a privy in estate and contract, as a lessee who from the nature of the covenant entered into by him, while an assignment destroys the privity of estate the privity of contract remains, and he may be liable on his contract.

§ 144. If a party after a judgment against him assign his interest, his assignee will be bound; as it is conclusive against the assignor it must be against the assignee, for the substitute can be in no better position than the principal,<sup>3</sup> as for example where a mortgagor, when sued for possession, pleaded usury as a defense and failed in establishing it, he afterwards assigned his rights to a third party, who brought a writ of entry against the mortgagee, and in support of his action plead usury. The former judgment between the mortgagor and mortgagee was held conclusive against him. So in an action before a justice of the peace, by the payee for the use of the holder, the maker pleaded

<sup>1</sup> Martin v. Ellerbe, 70 Ala. 326; Castellaro v. Guilmartin, 54 Ga. 299.

<sup>2</sup> Young v. Babilon, 91 Pa. St. 280; Vensel's Appeal, 77 Pa. St. 71; Cox v. Rogers, 77 Pa. St., 160.

<sup>3</sup> Adams v. Barnes, 17 Mass. 365; Bumpass v. Reams, 1 Sneed, 595; French v. Shotwell, 5 Johns. Ch. 555; Woodin v. Clemens, 32 Iowa, 280; Dalby, *in re*, 1 Low. 431; Ames, *in re*, 1 Low. 561; Rockford, &c. R. Co *in re*, 1 Low. 345; Sargeant v. Fitzpatrick, 4 Gray, 511; Haney v. Richards, 2 Gall. 216; Lessee v.

Thomas, 3 Bl. C. C. 11; Drake v. Perry, 58 Ill. 122; Briscoe v. Lloyd, 64 Ill. 33; Davis v. Converse, 35 Vt. 503; Sutherlin v. Mullis, 17 Ind. 19; Craig v. Waid, 26 Barb. 317; Bissell v. Kellogg, 60 Barb. 617; Brewster v. Gauss, 37 Mo. 518; Doyle v. Peckham, 9 R. I. 21; Hartson v. Shanklin, 58 Cal. 248; Laurence v. Milwaukee, 45 Wis. 306; Goodenow v. Litchfield, 59 Iowa, 226; Upham v. Paddock, 23 Hun, 377; Tompkins v. Hyatt, 28 N. Y. 347; Johnson v. Thaxter, 7 Gray, 242; Gill v. U. S., 7 Ct. Clms. 522; Peddicord v. Hill, 4 Mon. 370.

fraud and judgment was rendered in his favor, from which an appeal was taken. The holder afterwards withdrew the note, filled up the blank indorsement, and sued in his own name as assignee. The judgment was a bar to the second suit.<sup>1</sup>

§ 145. All privies, whether in estate, in blood or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity. Every person who has made an unqualified agreement to become responsible for the result of a litigation, or upon whom such a responsibility is cast by operation of law, in the absence of any agreement is conclusively bound by the judgment. "Wherever this identity of interest is found to exist all alike are concluded. Thus, if one covenant for the results or consequences of a suit between others, as if he covenants that a certain mortgage assigned by him shall produce a specific sum, he thereby connects himself in privity with the proceedings and the record of the judgment in that suit will be conclusive against him. Thus, the appellant, having bound himself that defendants in the attachment suit would cause the property levied upon and replevied to be forthcoming to abide the order of the court, has connected himself in privity with the proceedings and made the judgment conclusive against him."<sup>2</sup> So where a party whose goods were insured in the name of another, with whom they were stored, after a loss, agreed with the party insuring that suit should be brought in his name for the use of the owner, which was done and prosecuted in good faith; but on a trial the action was defeated without fault of the nominal plaintiff. The owner of the goods, being a privy in interest, was concluded by the judgment and could not re-litigate the matter in suit against the party who had made the insurance, for an alleged breach of his agreement to insure.<sup>3</sup> One cannot be a privy in estate to a judgment or decree unless he derives his title to the property in question subsequent to, and from some party who is bound by such judgment or decree.<sup>4</sup> Thus, A. being the owner of a lot conveyed a half each to B. and C. Subsequently D., claiming title thereto, brought suit against A. and C. for trespass, *quare clausum fregit*. D. having obtained judgment, such judg-

<sup>1</sup> Drake v. Perry, 58 Ill. 123

man v. Rahm, 53 Cal. 111.

<sup>2</sup> Collins v. Mitchell, 5 Fla. 371;

<sup>3</sup> Cole v. Favoute, 69 Ill. 457.

Rapelye v. Prince, 4 Hill, 119; Free-

<sup>4</sup> Hunt v. Haven, 52 N. H. 162.

ment merely estopped A. and C. from asserting their title against D. ; it did not transfer their title to him nor prevent B. from subsequently recovering the whole land.<sup>1</sup> When a statute makes provision that the estate of a party, not named as a party to a judgment, may be taken to satisfy such judgment, and it is taken, he becomes a privy in law to that judgment.<sup>2</sup> But to prevent this rule from working injustice it is essential that its operation be mutual. Both the litigants must be alike concluded or the proceedings cannot be set up as an estoppel upon either. For if the adverse party was not also a party to the judgment offered in evidence, it may have been obtained upon the party's own testimony, in which case, to allow him to derive a benefit from it would be unjust.<sup>3</sup>

§ 146. No man is bound by a judgment or decree to which he is not a party or privy and of which he has not had notice ; yet he may agree to be sued in any particular way or name or by any mode of agency and to receive notification of legal proceedings in any manner that his interests or convenience may require, and if so sued and notified he is just as fully and as firmly bound by all of the proceedings in the suit as if he had entered into no such engagement, and were made a formal party and duly served with process and notified in person.<sup>4</sup>

§ 147. In order, generally, to make a person a party to a judicial proceeding it is necessary to make a formal and legal service of summons upon him to appear, or by voluntary appearance of the party without service.<sup>5</sup> But there is an exception to this, as there is generally to all rules of law, and the exception is that by the intervention of a party in the prosecution or defense of an action in which he is interested, he is held to be concluded by

<sup>1</sup> Williams v. Sutton, 43 Cal. 65.

<sup>2</sup> Merrill v. Bank, 31 Me. 57.

<sup>3</sup> Wood v. Davis, 7 Cranch, 271; Davis v. Wood, 1 Wheat. 6.

<sup>4</sup> Glenn v. Williams, 60 Md. 96; Vallee v. Dumergue, 4 Exch. 239; Bank v. Harding, 9 M. G. & S. 660; Bank v. Nias, 4 Eng. Law & Eq. 252; Copin v. Adamson, L. R. 9 Exch.

345; Rousillon v. Rousillon, L. R. 14

Ch. D. 351; R. R. Co. v. Wheeler, 1 Black, 286; Muller v. Dows, 94 U. S. 444; Ogilvie v. Ins. Co., 22 How. 387; Hatch v. Dana, 101 U. S. 203; Stevens v. Fox, 83 N. Y. 313; Hall v. Ins. Co., 5 Gill, 484; Matthews v. Albert, 24 Md. 527; Weber v. Fickey, 52 Md. 500.

<sup>5</sup> Martin v. Germandt, 19 Pa. St. 124.

the result;<sup>1</sup> nor can the rights of such third persons be impaired by any collateral proceedings; in other cases, where parties were allowed to notify third persons to come in and take defense, and where such notice did not emanate from the court.<sup>2</sup>

§ 148. In matters of private right a judgment is evidence only against parties and privies. A court will look beyond the record and treat as parties all who are found to have in fact acted a part, and this, whether their interference was irregular or not.<sup>3</sup> Yet, except in particular cases, no one will be forced to become a party, indirectly, who could not be brought in directly; and even in the excepted cases he must have had notice to defend. The notice to defend is derived by analogy from the voucher to warranty and came into use with the personal action of covenant, when it superseded both the voucher and the ancient *warrantia chartæ*, and, like the voucher, its object is a recovery over against the warrantor, with whom none but the party against whom the recovery has been had, has to do.

The purpose of giving notice is not in order to give a ground of action, but if a demand be made which the party indemnifying is bound to pay, and notice be given to him and he refuses to defend the action, in consequence of which the person indemnified is obliged to pay the demand, that is equivalent to a judgment and estops the other party from saying that the defendant in the first action was not bound to pay the money.<sup>4</sup>

A person not a party, but who takes upon himself the defense of a suit, is bound by the judgment, as where a vendor sells and warrants title to chattels and assumes his vendee's defense.<sup>5</sup> If

<sup>1</sup> Adams v. Preston, 22 How. 473; Peterson v. Lathrop, 34 Pa. St. 223; Carpenter v. Pier, 30 Vt. 81; Kerr v. Union Bank, 18 Md. 396; Ingraham v. Dawson, 20 How. 486; O'Brien v. Weld, 15 N. B. R. 405; Garvin v. Graydon, 41 Ind. 559; Shelton v. Brown, 22 La. Ann. 162; Jennings v. Sheldon, 44 Mich. 92; Jones v. Pashby, 48 Mich. 634; Estelle v. Peacock, 48 Mich. 469; Bachellor v. Brown, 47 Mich. 366; Richardson v. Jones, 16 Mo. 177.

<sup>2</sup> Heller v. Jones, 4 Binn. 161;

Chirac v. Reinecker, 2 Pet. 613; Chambers v. Lapsley, 7 Pa. St. 24; Doe v. Chellis, 17 Q. B. 166.

<sup>3</sup> Stoddard v. Thompson, 31 Iowa, 80; Markham v. Thompson, 23 La. Ann. 685; Larunn v. Wilmer, 35 Iowa, 244.

<sup>4</sup> Duffield v. Scott, 3 T. R. 347; Jones v. Williams, 7 M. & W. 493; Smith v. Crompton, 3 B. & A. 407; Bloomington v. Roush, 13 Ill. App. 339.

<sup>5</sup> Jennings v. Sheldon, 42 Mich. 92; Bachellor v. Brown, 47 Mich. 366;

one, not a party of record nor in privity with a party of record to a judgment, desires to avail himself of the judgment as an estoppel, on the ground that he in fact defended the action resulting in the judgment, he must not only have defended that action, but must have done so openly, to the knowledge of the opposite party and for the defense of his own interests. That he employed the attorney who appeared for the defendant of record, and appeared as a witness for defendant, is not sufficient.<sup>1</sup> Such judgment is conclusive only on such privies as are liable over, and only as to the fact that the judgment was recovered, and that it was for the amount stated. Thus, if one carrier is sued for the loss of goods, and notifies a second carrier, to whom they were delivered for continuous transportation, of the pendency of the suit, and requires it to defend, the judgment against it is not conclusive as to the question of the *liability of the second*.<sup>2</sup>

§ 149. A defendant may call upon any one whose liability for the cause of action is primary as compared with his own, to assume the burden of the defense in the action; the notice given by the defendant will be as effectual in binding such party by the judgment rendered in such action as though the notice emanated from the court;<sup>3</sup> as where the covenantee in a deed is sued for possession of the real estate by one claiming under a paramount title, the covenantee may relieve himself of the burden of defending the suit by giving notice to his covenantor of the pen-

Estelle v. Peacock, 48 Mich. 469;  
Jones v. Pashby, 48 Mich. 634.

<sup>1</sup> Schroeder v. Lohman, 26 Minn. 87.

<sup>2</sup> R. R. Co. v. Packet Co., 70 Ill. 217.

<sup>3</sup> Boston v. Worthington, 10 Gray, 198; McNamee v. Moreland, 26 Iowa, 96; Milford v. Holbrook, 9 Allen, 17; Chamberlain v. Prible, 11 Allen, 373; Annett v. Terry, 35 N. Y. 256; Knapp v. Marlboro, 34 Vt. 425; Thomas v. Hubbell, 15 N. Y. 405; Love v. Gibson, 2 Fla. 598; Chicago v. Robbins, 2 Black, 418; Hand v. Taylor, 4 Ind. 409; Hazard v. Nagle, 40 Pa. St. 178; Portland v. Richardson, 54 Me. 46; Carleton v. Davis, 8 Allen, 94; Bis-

sick v. Kenzie, 4 Daly, 265; Tracy v. Goodwin, 5 Allen, 409; Carman v. Noble, 9 Pa. St. 366; State v. Roswell, 14 Ohio St. 73; Miner v. Clark, 15 Wend. 425; Lipscomb v. Postell, 38 Miss. 476; Lyon v. Northrop, 17 Iowa, 314; Konitzky v. Meyer, 49 N. Y. 471; Dane v. Gilmore, 51 Me. 544; Kip v. Brigham, 6 Johns. 158; S. C., 7 Johns. 168; Brown v. Bradford, 30 Ga. 927; Bridger v. Pearson, 45 N. Y. 601; Morgan v. Muldoon, 82 Ind. 347; Blasdale v. Babcock, 1 Johns. 517; Packet Co. v. Garrison, 6 Daly, 246; Littleton v. Richardson, 34 N. H. 179; Thrasher v. Harris, 2 N. H. 429; Jackson v. Marsh, 5 Wend. 44; Beers v. Pinney, 12 Wend. 309.

dency of the suit, and thereby cast upon him the duty of defending the title, and bind him by the judgment, and while, as a general rule, a principal is not bound as privy by a judgment on an action of debt against the guarantor or surety,<sup>1</sup> to which he is not made a party, and may contest the validity of the judgment;<sup>2</sup> he is brought within the reach of the estoppel when notified by the defendant to come in and take part in the defense.<sup>3</sup>

§ 150. One who is benefited by the prosecution of an action of which he has notice, is to be regarded as a party in interest, although his name does not appear therein, and he is bound by the judgment therein.<sup>4</sup> Thus on sale of a note there is an implied warranty that no legal defense exists against it.<sup>5</sup> If a defense is set up and the seller is notified to assume the prosecution, but will not do so and the defense is sustained, the seller is estopped, in a subsequent action against him by the buyer of the note, on the warranty, from setting up that the defense was not a valid one.<sup>6</sup> So one who, at the request of another, enters into a contract as his surety, the law implies a promise of indemnity, and the principal is bound by a judgment in a suit brought by a third party against the surety on the contract of suretyship, if he has notice of the suit, although there was no provision in the contract.<sup>7</sup> Where a third person is responsible over to the defendant in an action, and is duly notified of its pendency, the judgment therein, if rendered without fraud or collusion, will be conclusive against him. It is not essential that he is requested to assume the defense.<sup>8</sup>

<sup>1</sup> *Brown v. Chancey*, 1 Ga. 410; *Douglas v. Howland*, 24 Wend. 35; *Jackson v. Griswold*, 4 Hill, 522; *Moore v. Lucas*, 8 Blackfd. 9.

<sup>2</sup> *French v. Parrish*, 14 N. H. 496.

<sup>3</sup> *Duffield v. Scott*, 3 T. R. 374; *Jones v. Williams*, 7 M. & W. 492; *Thomas v. Hubbell*, 18 Barb. 9; *Denny v. Wheelwright*, 60 Miss. 733.

<sup>4</sup> *McConnell v. Downes*, 48 Ill. 273; *Kip v. Brigham*, 6 Johns. 158; *Kettle v. Lipe*, 6 Barb. 467; *Rake v. Smith*, 2 Abb. N. Y. App. 76; *Bridgeport v. Wilson*, 34 N. Y. 275; *Fay v. Ames*, 44 Barb. 327; *Thomas v. Beckman*, 1 B. Mon. 29; *People v. Judges*, 1 Wend.

19; *Love v. Gibson*, 2 Fla. 598; *Clark v. Carrington*, 7 Cranch, 308; *Tyree v. Magness*, 1 Sneed, 276; *Lacock v. Commonwealth*, 99 Pa. St. 207; *Hamilton v. Cutts*, 4 Mass. 249; *Bander v. Fremberger*, 4 Dall. 436; *Bush v. Knox*, 5 T. & C. 130; *Lloyd v. Bur*, 11 Pa. St. 41; *Konitzky v. Meyer*, 49 N. Y. 571; *Swartout v. Payne*, 19 Johns. 294; *Hanna v. Wray*, 77 Pa. St. 27.

<sup>5</sup> *Conger v. Chilcote*, 42 Iowa, 18.

<sup>6</sup> *Fake v. Smith*, 2 Abb. App. N. Y. 76.

<sup>7</sup> *Konitzky v. Meyer*, 49 N. Y. 571.

<sup>8</sup> *Heiser v. Hatch*, 86 N. Y. 614.

§ 151. But no case has decided that the notice should be in any particular form. In some, it is suggested that it would be better if notice in writing were required; but most of the cases assume that, if sufficient in substance, it need not be in writing; and except for facility in proving it, and certainty as to its character, there is no reason why it should be written or formal. If it clearly apprise the person to whom it is given that an action involving the title has been commenced, and that the defendant giving it, looks to him to establish the title in that action, the object of the notice is accomplished. It then becomes the duty of the person to whom it is given to defend the title for which he is holden to the defendant giving it.<sup>1</sup>

The principle, *interest reipublicæ ut sit finis litium*, will thus be seen to pervade the entire branch of this doctrine of the law, and all instances and cases cited, all decisions made, have their foundation in this fundamental maxim.

§ 152. All heirs are privies when they claim or derive title through and from the ancestor; as an example, a case may be cited;<sup>2</sup> in an adjudication a mother was declared a slave, the judgment was held conclusive evidence that all the children born prior to the judgment were also slaves; this was on the fact that it operated as a judgment *in rem*, and *ipso facto* rendered her such as the judgment declared her to be. A husband may be bound by a judgment against a woman while a feme sole, as representing the person and succeeding to the estate of his wife.<sup>3</sup> Everyone who claims or justifies under a conveyance made or command given by another is in privity with him who made the conveyance or issued the mandate, and is bound by an estoppel relating directly to the interest conveyed or right on which the mandate is founded.<sup>4</sup> A master or principal is in privity with his servant or agent when the latter defends an action in the right of the former, and a judgment is an estoppel to a renewal of the

<sup>1</sup> Hersey v Long, 30 Minn. 114; Cummings v. Harrison, 51 Miss. 275; Paul v. Witman, 3 W. & S. 417; Morrison v Mullen, 34 Pa. St. 13.

<sup>2</sup> Shelton v. Barber, 2 W. C. C. R. 612; Wood v. Jackson, 8 Wend. 9.

<sup>3</sup> Outram v Morewood, 3 East, 125; Hawkins v. Lambert, 18 B. Mon. 99.

Beebee v. Elliott, 4 Barb. 457; Calkins v. Allaton, 3 Barb. 171; Maltonner v. Dunwick, 4 Barb. 586; Hendrickson v. Norcross, 19 N. J. Eq. 417; Colborn v. Trimpey, 36 Pa. St. 463; Arnot v. Beadle, Hill & D. 181, Cincinnati, &c. Co. v. Wynne, 14 Ind. 385.

controversy by the principal or master<sup>1</sup> in the suit, on the ground that he is considered the real party, and specially when the principal expressly or impliedly authorized or ratified the acts of the agent, virtually rendering him a party to the proceedings instituted by or against the other.<sup>2</sup> Thus an agent, having property of his principal in his possession, and being sued for such property, had judgment rendered against him. The principal had knowledge of the suit and took part in the defense; he was concluded by the judgment.<sup>3</sup> So a suit was commenced against a master for a trespass committed by his servant, under his order and direction. After a trial upon the merits, ending in a judgment for the defendant, the plaintiff was thereby precluded from maintaining an action against the servant for the same trespass.<sup>4</sup> So where a servant is sued for trespass in taking property, and the master defends the suit, and justifies his servant in the taking, the judgment is conclusive on the master, because it is his duty to indemnify the servant in acting as his agent; he is bound to appear and defend, and a judgment in his servant's favor is conclusive as a defense to an action by the same plaintiff against the master for the same trespass.<sup>5</sup> The principal and servant are substantially one in interest. To permit a person to commence an action against the principal, and to prove the acts, alleged to be trespasses, to have been committed by his servant, acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases, the technical rule that a judgment can only be admitted between the parties to the record, or their privies, expands so as to admit it when the same question has

<sup>1</sup> Voorhees v. Seymour, 26 Barb. 369; Emery v. Fowler, 39 Me. 326; Heller v. Jones, 4 Binn. 61; Castle v. Noyes, 14 N. Y. 329; Kent v. R. R., 22 Barb. 278; Peterson v. Lathrop, 34 Pa. St. 223; Baily v. Foster, 9 Pick. 139; Case v. Reeve, 14 John. 80; Farnsworth v. Arnold, 3 Sneed, 252; Green v. Clark, 12 N. Y. 343;

Warfield v. Davis, 14 B. Mon. 40.

<sup>2</sup> Kinnersly v. Orpe, Doug. 517; Alexander v. Taylor, 4 Den. 302.

<sup>3</sup> Warfield v. Davis, 14 B. Mon. 40.

<sup>4</sup> Emery v. Fowler, 39 Me. 26; Hitchin v. Campbell, 3 Wils. 304; Kinnersly v. Orpe, Doug. 517.

<sup>5</sup> Castle v. Noyes, 14 N. Y. 329.

been decided and judgment rendered between parties responsible for the acts of others.<sup>1</sup>

§ 153. Covenants to indemnify against the consequences of a suit are of two classes: First, where the covenantor expressly makes his liability depend upon the event of a litigation to which he is not a party, and stipulates to abide the result; in this class the judgment is conclusive evidence against the indemnitor, though he was neither a party or had notice; for its recovery is the event against which he covenanted. Second, where the covenant is one of general indemnity, against claims or suits, the want of notice does not go to the cause of action, and the judgment is only *prima facie* evidence against the indemnitor, and he may be let in to show that the principal had a good defense to the claim, which he neglected to make, to defeat the judgment, or that it was obtained by fraud or collusion, etc., but if notice is given they are concluded.<sup>2</sup> This rule applies in like manner between grantor and vendor, and the grantee and vendee of real and personal property in an action against the vendee or grantee by third parties, the grantor or vendee as the case may be, when notified or called upon to assume the burden of a suit in ejectment or trover, else be concluded and bound by the judgment and estopped from disputing the title on which the action is brought, in a subsequent suit against himself, in an action founded upon an express or implied warranty or covenant in the sale or grant.<sup>3</sup> The notice, however, to have this conclusive effect, must

<sup>1</sup> Emery v. Fowler, 39 Maine, 326.

<sup>2</sup> Duffield v. Scott, 3 T. R. 374; Smith v. Compton, 3 B. & A. 407; Lee v. Clark, 1 Hill, 56; Rapelye v. Prince, 4 Hill, 119; Patton v. Caldwell, 1 Dallas, 419, Ins. Co. v. Wilson, 34 N. Y. 180; Brown v. Chancey, 1 Ga. 410; Moore v. Lucas, 8 Blfd 9; French v. Parrish, 14 N. H. 496; Jones v. Williams, 7 M. & W. 492; Thomas v. Hubbell, 18 Barb. 9; Saveland v. Green, 36 Wis. 612; Valentine v. Mahoney, 37 Cal. 389; Altschue v. Polack, 55 Cal. 633; Carr v. U. S., 98 U. S. 433; Greenlaw v. Williams, 2 Lea, 533.

<sup>3</sup> Hawie v. Turner, 46 Mo. 444; Andrews v. Dennison, 16 N. H. 469; Knapp v. Marlboro, 34 Vt. 235; Doe v. Challis, 17 Q. B. 166; Littleton v. Richardson, 34 N. H. 187; Mathew v. Osborne, 13 C. B. 916; Chamberlain v. Picble, 11 Allen, 70; Boyd v. Whitfield, 19 Ark. 447; Harding v. Larkin, 41 Ill. 415; Hardy v. Nelson, 27 Me. 539; Oetgen v. Ross, 47 Ill. 142; St. Louis v. Bissell, 46 Mo. 157; Doe v. Huddart, 2 C. M. & R. 216; Wright v. Tatham, 1 A. & E. 19; Steele v. Lionberger, 59 Pa. St. 308; Bank v. Humphries, 47 Ill. 227; Douglas v. Fulda, 45 Cal. 592,

clearly and explicitly convey the precise information and notify the party to whom it is written or sent ; that unless he takes the necessary steps to defend the suit and prove the validity of his title in the first suit, he will be estopped from doing so in the subsequent action.

§ 154. No one can take advantage of a verdict, if they would not have been prejudiced by it, had it been contrary, as estoppels are mutual. So where an ejectment suit was brought by the assignee of the lessor against the assignee of the lessee, for the non-payment of rent on lease, containing a covenant for re-entry, and a judgment was rendered therein in favor of the plaintiff for recovery of possession of the premises. In a subsequent action, brought by a party claiming through a purchaser of the land at a foreclosure sale under a mortgage executed by the assignee of the lessee, subsequent to the date of the lease, but prior to the commencement of the ejectment suit, it was held that the judgment in the first mentioned ejectment suit was a bar to any recovery in the subsequent suit. The lessee was privy to the lessor, and the defendant in the ejectment suit (the assignee of the lessee) was also privy. The grantee in the mortgage executed by such defendant, took subject to the rights of the lessor, and the sale of the premises under the foreclosure proceedings did not in any way affect or impair those rights, or give the plaintiff any title as against the defendant ; and the title which the plaintiff claimed, through and under the defendant in the ejectment suit, having been perfected by the foreclosure proceedings after the ejectment suit was commenced, the judgment in the latter suit, in connection with the title which the evidence established under the lease, was conclusive against the plaintiff.<sup>1</sup>

§ 155. An action is between the same parties, so as to be within the principle of *res adjudicata*, not only when the same

Russell v. Mallon, 38 Cal. 263; Valentine v. Mahoney, 37 Cal. 389; Caldewood v. Brook, 28 Cal. 151; Dimmick v. Deringer, 32 Cal. 438; Wheelock v. Warchauer, 34 Cal. 265; Jennings v. Sheldon, 44 Mich. 92; Cummings v. Harrison, 57 Miss. 275; Blasdale v. Babcock, 1 John. 518; Collingwood v. Irwin, 3 Watts, 311; Kelly v. The Church, 2 Hill, 105; Hamilton v. Cutts, 4 Mass. 349; Carpenter v. Pier, 30 Vt. 81; Fisk v. Woodruff, 15 Ill. 15.  
<sup>1</sup> Bennett v. Couchman, 48 Barb. 73; Shirley v. Fenne, 33 Miss. 653; Verner v. Carson, 66 Pa. St. 640.

persons are parties, but when they have appeared by their agents or representatives. Upon these grounds, if the officers of a corporation commence an action in the corporate name, or the corporation is made a party defendant, the successors in office of such officers cannot renew the litigation; for the corporation was the real party in the prior action, and a change of officers does not change the parties to the cause. The successors of the parties—those who succeed to their rights—are regarded the same as the original parties; therefore a judgment for or against a corporation or its officers has the same effect as *res judicata*, as it had with those whom they succeeded. Every person whom the parties plaintiff and defendant represent in the suit are bound as privies by the judgment. A corporation represents and binds the stockholders in all matters within the limits of its corporate power, transacted in good faith by its officers, and their discretion cannot be controlled by the stockholders. Among the fundamental powers of a corporation are those of bringing and defending suits, affecting the rights and obligations of the corporation, in which it represents and binds the stockholders as fully as in the making of contracts.<sup>1</sup> In any ordinary action or suit against the corporation to establish and recover a debt, the stockholders are neither necessary or proper parties, they are represented by the corporation; and if they in their individual capacities are allowed to intervene at all, it can only be in the name of the corporation. A stockholder, being a component part of the corporation, derives whatever interest he may have, from its corporate powers; in the issuance of a certain proportion of its capital as represented by stock to him, upon which all his rights, interests and liabilities depend. The law by which corporations are created provides, among other

<sup>1</sup> *Oglesby v. Attrill*, 105 U. S. 605; *Graham v. R. R. Co.*, 14 F. R. 753; *Came v. Bringham*, 39 Me. 35; *Farmum v. Ballard*, 12 Cush. 507; *Lane v. School District*, 10 Met. 462; *Johnson v. Somerville*, 15 Gray, 216; *Samuels v. Holliday*, 1 Woolw. 400; *Mercantile Co. in re*, L. R. 1 Eq. 277; *Baily v. R. R. Co.*, 12 Beav. 433; *Walker v. R. R. Co.*, 34 Miss. 245; *Elison v. R. R. Co.*, 36 Miss. 572; *Durfee v. R. R. Co.*, 5 Allen, 242; *Newby v. R. R. Co.*, 1 Sawy. 63; *Bissett v. Nav. Co.*, 15 F. R. 361; *Landis v. Hamilton*, 77 Mo. 554; *Weber v. Fickey*, 47 Md. 196; *Milliken v. Whitehouse*, 49 Me. 527; *R. R. Co. v. Howard*, 7 Wall, 392; *Thayer v. Printing Co.*, 108 Mass. 527; *Bank v. Nias*, 4 E. L. & Eq. 252; *Slee v. Bloom*, 20 Johns. 669

things, how its capitalization may be fixed, and how its managers may be selected, etc. While the rights of stockholders are protected by law, there is no recognition of stockholders in the management of the affairs of a corporation, except as a qualification for managers. Hence, whatever concludes or affects a corporation, binds and concludes all of its stockholders who compose the corporation, and therefore a judgment against a corporation unless it was procured by fraud or collusion is conclusive upon the stockholders,\* as well as against the corporation and its property.

In cases brought by creditors against the stockholders to enforce the statutory liability the judgment is conclusive as to the amount and the validity of such creditors' claims, and is conclusive of the existence of the debt for which it was rendered. Suits to collect unpaid subscriptions to stock are in the nature of creditors' bills to subject a stockholder's indebtedness to the satisfaction of judgments against the corporation. In the language of Mr. Justice Miller, they are neither suits at law or equity; they are purely statutory remedies. Irregularities in these judgments, or fraud in giving them, or mistake, accident, or if otherwise irregular in the amount, constitutes no defense either in whole or in part. Nor can they be impeached collaterally; as between the parties who have the legal right to fix the amount, that has been done, and the judgment is conclusive evidence of it; and as against the debtors of the company, nothing is left but to determine the amount due from them (subject, of course, to impeachment for fraud or collusion). Upon the same principle, a judgment

<sup>1</sup> Henry v. R. R. Co., 17 Ohio, 187; Wilson v. Coal Co., 43 Pa. St. 424; Stephens v. Fox, 83 N. Y. 313; Gaskill v. Dudley, 6 Met. 546; Conway v. Duncan, 28 Ohio St. 102; Bank v. Stevens, 1 Ohio St. 233; Denworth v. Coolbaugh, 5 Iowa, 300; Hawes v. Petroleum Co., 101 Mass. 385; Bank v. Paper Co., 9 Cush. 576; Bank v. Nias, 4 E. L. & Eq. 252; Cane v. Brigham, 39 Me. 35; Milliken v. Whitehouse, 49 Me. 529; Johnson v. Somerville, 15 Gray, 216; Slee v. Bloom, 20 Johns. 669; Hudson v. Car-

men, 41 Me. 84; Miller v. White, 8 Abb. N. S. 46; Conklin v. Furman, 57 Barb. 454; Bullock v. Kilgour, 39 Ohio St. 93; Watterson v. Lyons, 9 Lea 566; Keyser v. Hitz, 2 Mackey, 473.

<sup>2</sup> Henry v. R. R. Co., 17 Ohio, 187; Conway v. Duncan, 28 Ohio St. 102; Bank v. Stevens, 1 Ohio St. 233; Denworth v. Coolbaugh, 5 Iowa, 300. Cane v. Brigham, 39 Me. 35; Milliken v. Whitehouse, 49 Me. 529; Wilson v. Coal Co., 43 Pa. St. 424; Gaskill v. Dudley, 6 Met. 546; Hawes

against a city, county or school district, in a matter of general interest is binding upon all its citizens, though not made parties by name.<sup>1</sup> Thus where the validity of a tax is determined, without fraud, in an action against the officers of a county to compel its collection, that decision is a bar to an action by the taxpayers of such county to enjoin its collection. So where a judgment has been rendered against a municipal corporation upon coupons or for any other valid claim, and proceedings are commenced by mandamus to compel the levy of a tax to pay the judgment, the regularity of the proceedings on which the judgment was rendered or the validity of the judgment cannot be contested in answering to the rule to show cause why a mandamus should not issue. The only way in which irregularities can be taken advantage of is by appeal.<sup>2</sup> No taxpayer can prevent the levy of such tax, and relitigate the matters adjudicated in such action against the corporation. Thus a church corporation permitted a suit to be brought for its benefit, though not in its name, against its trustees, and the corporation accepted the benefits of the suit, it could not afterwards by suit in its own name relitigate the same matter, nor allege that it was not bound by such portions of the decree in the first suit as were unfavorable to it. The court said: "It will be enough to say that the former proceedings in equity, relied on as a defense, and the present were substantially between the same parties. The present corporation, appellants, accepted and have enjoyed the benefit of the decree in the first case so far as it was in their favor, and they ought not to be allowed now to say that the proceeding was not

v. Petroleum Co., 101 Mass. 385; Chase v. Vanderbilt, 62 N. Y. 307; Johnson v. Somerville, 15 Gray, 216; Bank v. Paper Co., 9 Cush. 576; Bank v. Nias, 4 Eng. L. & E. 252; Hampton v. Weare, 4 Iowa, 413; Bissit v. Nav. Co., 15 F. R. 361; Thompson, Liab. of Stock, § 329, et seq.; Stephens v. Fox, 83 N. Y. 313

<sup>1</sup> Lyman v. Farris, 53 Iowa, 408; State v. Rainey, 74 Mo. 229; Nevil v. Clifford, 45 Wis. 161; Cemetery Co. v. People, 92 Ill. 619; Chicago v. Rob-

bins, 4 Wall. 657; Chicago v. Robbins, 2 Black, 418; Landis v. Hamilton, 77 Mo. 554; Clark v. Wolf, 20 Iowa, 127; State v. R. R. Co., 13 S. C. 290; Preble v. Supervisors, 8 Biss. 358.

<sup>2</sup> Huntington v. Smith, 25 Ind. 486; Buell v. Trustees, 11 Barb. 602; State v. Beloit, 20 Wis. 79; Williams v. Sidmouth, &c. Co., L. R. 2 Exchq. 284; Gorman *in re*, 124 Mass. 190; Preble v. Supervisors, 8 Biss. 358; State v. Benson, 70 Ind. 481.

instituted and prosecuted for their benefit. The complainants representing them in that case demanded an account in the interest of the corporation, and it was refused. It was properly placed upon the ground of estoppel, because the whole congregation, including the sole remaining trustee, had acquiesced in the change of the ecclesiastical relations of the church, and it was not alleged then, nor is it alleged now, that a single dollar of the income was appropriated to any other than the legitimate purposes of the worship of God and the preaching of the gospel."<sup>1</sup>

So a trustee to whom a railroad exercises a mortgage upon its property to secure the payment of its bonds, such trustee represents the bondholders in all legal proceedings carried on by him affecting his trust, and whatever binds him if he acts in good faith, binds them.<sup>2</sup> So a judgment against a receiver appointed in foreclosure proceedings is conclusive on the trustee and the bondholders, as he is their agent.<sup>3</sup>

§ 156. It is not always essential to the creation of an estoppel that the person should be a party to the record. One who instigates and promotes litigation for his own benefit by employing counsel or binding himself for the costs and damages, will be bound by the litigation or procedure as much as the party to the record. Thus, where a city, at the request of certain citizens, instituted legal proceedings to condemn land for a street, the citizens agreeing to pay all damages that might be assessed, and afterward the city declined to pay the damages that were assessed, and in lieu thereof passed an ordinance declaring that the land sought to be condemned "be abandoned by the city," the citizens who instigated the proceedings were concluded from asserting a prior dedication of the same land for public use as a street.<sup>4</sup>

§ 157. A party is bound by an adjudication where he has all the ordinary rights of a litigant with respect to such adjudication. A party who contributes money for the purpose of employing counsel, and carrying on a litigation under a contract with a party to the

<sup>1</sup> Reformed Church's Appeal, 88 Pa. St. 503.

<sup>2</sup> Shaw v. R. R. Co., 100 U. S. 607; Huntington v. R. R. Co., 16 F. R. 906.

<sup>4</sup> Turner v. R. R. Co., 8 Biss. 527.

<sup>3</sup> Landis v. Hamilton, 77 Mo. 551; Wright v. Butler, 64 Mo. 165; Standard v. Thompson, 31 Iowa, 80; Lovjoy v. Murry, 3 Wall. 18; Strong v. Ins. Co., 62 Mo. 295.

record, has the right to take such action in the case as will protect his interests in such litigation. Thus the validity of a patent having been in part sustained in one circuit, suit was brought in another circuit for infringement by a party who had contributed to the payment of the counsel who had defended the first suit. *Held*, that the defendant was estopped by the adjudication in the other circuit, but that the court would not enter any decree based upon that opinion until the conclusion of the litigation in such other circuit.<sup>1</sup> Where several insurance companies agree that one company shall assume the defense, they to be bound by the judgment, an action prosecuted and judgment rendered against such company binds them all.<sup>2</sup> A judgment against the original insurer is binding upon reinsuring companies who had notice of the suit and an opportunity to defend. The liability of the insuring company can be litigated only once.<sup>3</sup>

§ 158. A judgment against the principal in an official bond, appearing by the record to have been recovered for acts or omissions which would be a breach of the conditions of the bond, is admissible against the sureties, in an action upon the bond, if not conclusive, is *prima facie* evidence of the plaintiff's right to recover and of the amount he is entitled to recover. In an action of this kind, the plaintiff's right of action against the sureties depends upon the fault or misconduct of their principal; and such fault or misconduct must be proved in the action against the principal in order to entitle the plaintiff to recover at all. It would seem, therefore, that a judgment against such principal, which is absolutely conclusive against him, that he was guilty of such breach or misconduct, ought to be at least presumptive evidence against his sureties of that fact. The sureties can, in an action against them, make use of a judgment in an action against their principal as a defense, when the judgment is in his favor. Take this case as an example: Suppose a plaintiff brings an action against a sheriff or any officer who has been compelled by law to give a bond with good and sufficient sureties for the faithful discharge of his official duties; and for a breach of such duties a

<sup>1</sup> Miller v. Tobacco Co., 2 McCrary, 375; U. S. &c. Co. v. Asbestos Co., 18 Blatchf. 310.

<sup>2</sup> Gnatt v. Ins. Co., 68 Mo. 503.

<sup>3</sup> Strong v. Ins. Co., 4 Mo. App. 7

party suffering a loss by reason thereof, brings an action, in the first instance, against such officer, and in such action the jury finds a verdict in favor of the officer, on the ground that he has not been guilty of any neglect or committed any breach; and after such verdict and judgment the plaintiff brings an action against the sureties in the bond of the principal, alleging the same neglect or breach as in the action wherein the judgment was rendered against him. It cannot be denied but that the sureties can use the judgment in favor of their principal as a complete bar to the plaintiff's cause of action. The judgment in favor of their principal is conclusive evidence against him, that he has not been guilty of the matters charged against him. The plaintiff can only recover in the action against the sureties by proof of the guilt of their principal, and, as between the plaintiff and their principal, the question of his guilt is *res adjudicata* in the first action. Such judgment is, therefore, a complete bar to the action against the sureties. Again, if the plaintiff sues the principal, without joining the sureties, and he recovers a judgment against the principal for less than the amount of his claim for damages, and by reason of his failure to collect the amount from the principal, he then commences an action against the sureties, claiming a larger amount than that recovered in the action against the principal that judgment is conclusive in favor of the sureties as to the entire amount of damages he can recover against them. The judgment against their principal is conclusive against the plaintiff as to the extent to which he had been damaged by the default of the principal, and the sureties who are to answer only to the extent of the injury sustained by the plaintiff against their principal, can avail themselves of the judgment in the former action to limit the amount of damages, and the plaintiff is as completely bound by the same as though he had expressly agreed that his damages did not exceed the amount of the former judgment. It must, therefore, be evident that the judgment in the action against the principal is not "*res inter alios acta*" as to the sureties. Such judgment, if adverse to the plaintiff, is conclusive in favor of the sureties, and in any event is conclusive as to the extent of damages which he may recover against him.<sup>1</sup>

<sup>1</sup> Master v. Strickland, 17 S. & R. Wheat. 515; Webb v. State, 4 Coldw 354; Drummond v. Prestman, 12 200.

§ 159. There is another view of the question which is very ably stated by a learned jurist,<sup>1</sup> which was also an action against the sureties on an official bond. In reply to the objection that the judgment against the principal was *res inter alios acta*, the learned chief justice said: "We think the objection cannot be supported under the circumstances of this case. When one is responsible, by force of law or by contract, for the faithful performance of the duty of another, a judgment against that other for the failure of the performance of such duty, if not conclusive, is *prima facie* evidence, in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion it will be wholly set aside. But otherwise it is *prima facie* evidence, to stand until impeached or controlled in whole or in part by countervailing proofs." The grounds upon which the rule laid down by Chief Justice Shaw in the case above cited are as follows: First, because the judgment in the action against the principal, when in his favor, is a complete bar to the action against the sureties, and in any case fixes an absolute limit to the damages which can be recovered against them; "it should be mutual, so far at least, that when the judgment is against the principal it should be presumptive evidence against the sureties; and second, the nature of the contract in official bonds is that of a bond of indemnity to those

<sup>1</sup> Chief Justice Shaw, in *Lowell v. Parker*, 10 Met. 309; and this is fully sustained by the following cases: *Levi v. McCrary*, 1 Morris (Ia.) 96; *Berger v. Williams*, 4 McLean, 577; *Bradwell v. Spencer*, 16 Ga. 578; *Jacobs v. Hall*, 7 Leigh, 393; *Garver v. Commonwealth*, 7 Pa. St. 265; *People v. Wolf*, 16 Cal. 385; *Comstock v. Drohan*, 15 N. Y. Supreme Ct. 373; *Lee v. Clark*, 1 Hill, 56; *Franklin v. Hunt*, 2 Hill, 671; *Westervelt v. Smith*, 2 Duer, 449; *Annett v. Terry*, 35 N. Y. 256; *Fay v. Ames*, 44 Barb. 327; *Bartlett v. Campbell*, 1 Wend. 50; *Hazard v. Nagle*, 40 Pa. St. 178; *Eagles v. Kern*, 5 Whart. 144; *Evans v. Commonwealth*, 8 Watts, 398; *Masser v. Strickland*, 17 S. & R. 354; *Webbs v. State*, 4 Cald.

(Tenn.) 199; *Atkins v. Baily*, 9 Yerg. 111; *Baylee v. Marsh*, 1 Yerg. 460; *Drummond v. Prestman*, 13 Wheat. 515; *McLaughlin v. Bank*, 7 How. 220; *Iglehart v. State*, 2 G. & J. 235; *Dane v. Gilmore*, 51 Me. 544; *Tracy v. Goodwin*, 5 Allen, 409; *Train v. Gold*, 5 Pick. 380; *Charles v. Haskins*, 14 Iowa, 471; *Lyons v. Northrop*, 17 Iowa, 314; *Duffield v. Scott*, 3 T. R. 374; *Jones v. Williams*, 10 L. J. (N. S.) Exch. 120; *State v. Woodside*, 7 Ired. 296; *McLin v. Hardie*, 3 Ired. 407; *State v. Colerich*, 3 Ohio, 487; *Westervelt v. Clive*, 5 Ohio, 82; *Clark v. Montgomery*, 23 Barb. 464; *Coan v. Osgood*, 15 Barb. 583; *Jackson v. Griswold*, 4 Hill, 523; *De Greiff v. Wilson*, 30 N. J. E. 435.

who may suffer damages by reason of the neglect, fraud or misconduct of the officer."

"The bond is made with full knowledge and understanding that in many cases such damages must be ascertained and liquidated by an action against the officer for whose act the sureties make themselves liable, and the fair construction of the contract of the sureties is that they will pay all damages so ascertained and liquidated by an action against their principal. This construction of the contract is the most reasonable, and works no hardship against the sureties. It is better for them that this should be so. Otherwise it would be necessary for every person who desired to hold the sureties for the misconduct of the principal to join them in the first action, or else be subjected to a second litigation of the same matter, if unfortunately he should fail to obtain satisfaction after judgment against the principal; whereas if the rule laid down in the case of *Lowell v. Parker* is adhered to, the party injured will in most cases litigate the matter with the principal alone."

"The principal is the one who ought to be at the expense of the litigation and who ought to pay the damages. He is also the one who has the knowledge of the facts, and is certainly better prepared to litigate the matter than the sureties, who are not supposed to have any knowledge of the transaction. Certainly the defense is likely to be properly made by the principal, who has full knowledge of the facts, and who is to suffer most severely in case of a decision adverse to him. In most cases of this kind, if the sureties were sued, in the first instance, with their principal, the defense of the action would be made by such principal; and yet the judgment in such an action would necessarily be conclusive upon all. Holding the judgment against the principal alone presumptive evidence, as against the sureties, of the facts established by such judgment, can work no hardship, so long as the right is reserved to them of showing that the defense in such action was not made in good faith, was fraudulent, collusive, or suffered to be obtained through mistake as to the facts."<sup>1</sup>

§ 160. There is another view of the doctrine to be applied in cases of this kind, which has not been stated by the courts. It is

<sup>1</sup> *Stevens v. Shaffer*, 48 Wis. 154, S. C., 33 Am. R. 793.

first a well-settled rule, as old as the doctrine of *res adjudicata*, that estoppels ought to be reciprocal or mutual—that is, to bind both parties; and this is the reason that strangers (third persons, who are not parties, who have no right to appeal from the judgment or to adduce testimony), shall not take advantage of nor be bound by an estoppel. Unless this rule is to be abrogated, it must be evident that a surety cannot take advantage of a judgment in favor of his principal, when it will relieve him from all liability, unless he is on the contrary concluded by the same judgment that binds his principal when rendered against him. It is certainly a reasonable rule to adopt, “That if a surety can take advantage of, and plead, as a complete defense in an action against him, by the same plaintiff, a judgment against the plaintiff in an action between the plaintiff and his principal; that the surety should, in a precisely similar case, for the same cause of action, be bound by the judgment rendered in favor of the plaintiff and against his principal. It is the same cause of action, for the reason that the same evidence is necessary to support both actions.” Second, in the language of Lord Kenyon, “no one is allowed to blow hot and cold,” nor can a party maintain such inconsistent positions as to plead a former judgment as an estoppel, or take advantage of it as a defense in an action against him, and then in precisely the same action claim that he is not bound by the judgment because he is not a party to it. If it is axiomatic that a stranger can neither be bound by or take advantage of an estoppel, the converse of the rule must be equally so, “that nobody can take benefit by a verdict who had not been prejudiced by it had it gone contrary.” A surety is either a stranger where the action is brought by a plaintiff against the principal alone, or he is a privy. If a stranger, he cannot be permitted to take advantage of a judgment in favor of his principal; the action must be tried *de novo* against him. This gives him the right to plead all the defenses his principal did, and as the case would have to be tried by an entirely different jury, its verdict might be contrary to that rendered against the principal; and the natural sequence would be of having two antagonistic verdicts on precisely the same facts; for it is said that if separate suits be brought for the same cause of action against co-obligors, where one is principal and the other surety, and the principal is discharged on trial of a

plea to the merits, which would inure to both if sued jointly, such judgment is not an estoppel against the plaintiff, if pleaded by the surety in bar of the action against him, for the reason that strangers are not bound by an estoppel, nor can they take advantage of it.<sup>1</sup> It must, therefore, be evident that in the sense in which parties are held to be strangers, and not bound by *res adjudicata*, cannot apply to sureties. They must therefore be privies; for by the terms of the bond a surety obligates himself to pay upon the default of his principal. When, therefore, the default of his principal is the main fact adjudicated in an action against him, and it is judicially determined that his principal has committed a breach, and the amount of damages the party has sustained, that determination fixes the liability and extent thereof, not only as against the principal, but as to the sureties.<sup>2</sup> Such judgment is conclusive against the sureties for the reason, not that they make themselves privies in point of law to the action in which the judgment was rendered, but for the reason that, in point of fact, they had made themselves privies by agreeing to be bound by the result (that is, by the default or breach of condition of the bond). While it may be true that if the judgment in the action against the principal alone may be *res inter alios acta*, in a technical sense, it is not so in reality; for the reason that the same defense will be made, the same defendant will virtually defend the action, as the sureties presumably know nothing whatever of the facts, and are compelled to rely upon their principal, who presumably made the identical defense in the action in which judgment is rendered against him. Upon principle, therefore, the rule should be thus formulated: A judgment in an action against the principal alone, for acts or omissions which are a breach of the conditions of his bond, are, in the absence of fraud and collusion, conclusive evidence in an action brought by the same plaintiff, against his sureties on his official bond,<sup>3</sup> the cause of action being the same.

<sup>1</sup> Bank v. Robinson, 13 Ark. 214; McClelland v. Ridgeway, 13 Ala. 482; Morris v. Lucas, 8 Blackf. 9; Stingley v. Kirkpatrick, 8 Blackf. 186; King v. Norman, 4 C. B. 884; Tarleton v. Johnson, 25 Ala. 300; The Farmer v. McGraw, 31 Ala. 659; Crank v. Flowers, 4 Heisk. 640.

<sup>2</sup> Burger v. Williams, 4 McLean, 577; Livingston v. Hammer, 7 Bosw. 670; Parkhurst v. Sumner, 23 Vt. 538; State v. Coste, 36 Mo. 437; Hempstead v. Hempstead, 33 Mo. 134.

<sup>3</sup> McClellis v. Hinkle, 17 Ala. 459; Ralston v. Wood, 15 Ill. 157; Wiley k, 6 Conn. 71; Hend v. Lodge

§ 161. It may therefore be said, that the authorities holding that judgments against a principal are *prima facie* evidence in an action against the sureties, it is meant, that unless fraud or collusion or a mistake in the facts can be shown, the judgment is conclusive,<sup>1</sup> and this doctrine is applicable in actions upon bonds or recognizances given for the faithful performance of the duties of administrators, assignees, constables, sheriffs, trustees, and other parties filling offices of public or private trust. The same principle is applicable to sureties on injunction, stay, forthcoming appeal bonds, etc., on the ground of public policy, not because the sureties were privies, in point of law, to the action in which the judgment was rendered, but for the reason that, in point of fact, they make themselves privies by stipulating and agreeing to be bound by the result.<sup>2</sup> Persons who, being

20 Pick. 53; Heard v. Mitchell, 11 G. & J. 383; Boyd v. Caldwell, 4 Rich. 47; Fay v. Ames, 44 Barb. 327; Ragland v. Culhoun, 36 Ala. 606; State v. Coste, 36 Mo. 437; Ferguson v. Glaze, 12 La. An. 667; McCalla v. Patterson, 18 B. Mon. 201; Tracy v. Goodwin, 5 Allen, 409; Irwin v. Backus, 25 Cal. 214; Way v. Lewis, 115 Mass. 26; Cutter v. Evans, 115 Mass. 27; Ins. Co. v. Wilson, 34 N. Y. 275; Thomas v. Hubbell, 15 N. Y. 405; Moore v. Kepner, 7 Neb. 291; White v. Weatherbee, 126 Mass. 450; Stovall v. Banks, 10 Wall. 583; Hancock v. Welsh, 1 Stark. 347.

<sup>1</sup> Annett v. Terry, 35 N. Y. 256; Giltinan v. Strong, 64 Pa. St. 242; Douglas v. Howland, 24 Wen. 35; Dioso v. Morgan, 69 N. Y. 412; Parkhurst v. Sumner, 23 Vt. 538; State v. Cole-  
rick, 3 Ohio, 487; Carmack v. State, 5 Bin. 184; Kennedy v. Brown, 21 Kas. 171; Stone v. Dickenson, 5 Allen, 59; Brown v. Cambridge, 3 Allen, 474; Moore v. Kepner, 7 Neb. 291; Way v. Lewis, 115 Mass. 26; Cutter v. Evans, 115 Mass. 27; White v. Weatherbee, 126 Mass. 450; Hancock v. Welsh, 1 Stock. 347; Stovall v. Banks, 10 Wall. 583; Levi v. Mc-

Craey, 1 Morris (Ia.) 91; Comstock v. Drohan, 15 N. Y. Supreme Ct. 373; Parkhurst v. Sumner, 23 Vt. 538; State v. Holmes, 69 Ind. 577; Morrison v. Mullen, 34 Pa. St. 12; Barringer v. Allison, 78 N. C. 79; Towle v. Towle, 46 N. H. 432; Masser v. Strickland, 17 S. & R. 354; Sullivan v. Pierce, 10 Ark. 500; Bush v. Hampton, 4 Dana, 83; May v. Johnson, 3 Ind. 449; Lownes v. Hunter, 2 Head, 343; Guttridge v. Vanatta, 27 Ohio S. 366; Fay v. Ames, 44 Barb. 327; Ingraham v. Dawson, 20 How. 486; Lovejoy v. Murray, 3 Wall. 1; Richardson v. Jones, 16 Mo. 177; Thomas v. Hubbell, 15 N. Y. 405; Ins. Co. v. Wilson, 34 N. Y. 275; Ragland v. Culhoun, 36 Ala. 606; State v. Coste, 36 Mo. 437; but see Graves v. Bulkley, 25 Kas. 249; S. C., 37 Am. R. 249; Fay v. Edmiston, 25 Kas. 439.

<sup>2</sup> King v. Norman, 4 C. B. 884; May v. Johnson, 3 Ind. 449; People v. Reeder, 25 N. Y. 302; Boom Co. v. Wilkins, 27 Me. 345; McCloskey v. Wingfield, 33 La. An. 38; Greenlaw v. Logan, 2 Lea, 185; Bradley v. Chamberlain, 35 Vt. 277; Chamberlain v. Godfrey, 36 Vt. 380; Chaquette v. Ortel, 60 Cal. 594; Riddle v. Baker

strangers to a judgment when rendered, become sureties on defendant's appeal bond, cannot impeach the original judgment as procured by fraud.<sup>1</sup>

§ 162. This accords with the ancient doctrine as to sureties. Thus, "Where there are several debtors of an indivisible thing, they are regarded as one party, and, consequently, a judgment against any of them is deemed to be against all, and those who are not parties themselves might have been relieved by an appeal from the judgment."

In consequence of the obligation of the surety being dependent on that of the principal debtor, the surety was also regarded as the same party with the principal in respect to whatever is decided for or against him. Therefore, if the action has been decided in favor of the principal, the surety may, in a subsequent action against him, interpose the *exceptio rei judicate* to the creditor. "*Si pro servo meo fidejusseris et tecum de peculio*

13 Cal. 295; Keane v. Fisher, 10 La. An. 261; Binuse v. Wood, 37 N. Y. 526; Avelline's Estate, 53 Cal. 259; Erwin v. Backus, 25 Cal. 222; Fox v. Miner, 32 Cal. 124; Picol v. Webster, 14 Cal. 205; Stovall v. Banks, 10 Wall. 588; Bond v. Bibbups, 8 Jones L. 423; Thayer v. Clark, 48 Barb. 255; Ralston v. Wood, 15 Ill. 170; Shepard v. Peebles, 38 Wis. 378; Casoni v. Jerome, 58 N. Y. 321; Jones v. Doles, 3 La. An. 588; Hobbs v. Middleton, 1 J. J. Marsh. 176; Jones v. Ritter, 56 Ala. 270; Perkins v. Moore, 16 Ala. 9; Lamkin v. Heyer, 19 Ala. 228; Watts v. Gale, 20 Ala. 817; Williamson v. Howell, 4 Ala. 693; Heard v. Lodge, 20 Pick. 53; Stevens v. Mathews, 6 Vt. 269; Jones v. Jones, 8 Humph. 705; Lucas v. Guy, 2 Bailey, 403; Stewart v. Treasurer, 4 Ohio, 98; Webster's Bond *in re*, 3 N. J. E. 558; Manf. Co. v. Worcester, 45 N. H. 100; Taylor v. Johnston, 17 Ga. 521; Watts v. Colquitt, 66 Ga. 493; Church v. Barker, 18 N. Y. 463; Lothrop v. Southworth, 5 Mich. 436;

Meredith v. Association, 60 Cal. 617; Taylor v. R. R. Co., 45 Cal. 337; Holley v. Acie, 23 Ala. 603; Drummond v. Priestman, 12 Wheat. 515; Geroutch v. Wilson, 81 N. Y. 513; Dennie v. Smith, 129 Mass. 143, U. S. v. Hine, 3 McArthur, 27; Boone Co. v. Jones, 54 Iowa, 699; S. C., 37 Am. R. 229; Kelly v. West, 80 N. Y. 139; McWilliams v. Kaulbach, 55 Iowa, 110; Krall v. Libbey, 53 Wis. 292; State v. Gorman, 75 Mo. 370; Walsh v. Agnew, 12 Mo. 520; Cooley v. Warren, 53 Mo. 166; Grimmer v. Henderson, 66 Ala. 521; Davenport v. Reynolds, 6 Ill. App. 532; Baker v. Baldwin, 48 Conn. 131; Bank v. Freshman, 23 W. Va. 90; State v. Donegan, 12 Mo. App. 90; Hunicutt v. Kirkpatrick, 39 Ark. 172; Jones v. State, 14 Ark. 170; Lewis v. Commissioners, 78 Ga. 436; McCormick v. Hubbell, 4 Montana, 87; Martin v. Tully, 72 Ala. 23; Wood v. Kessler, 93 Ind. 356.

<sup>1</sup> Krall v. Libbey, 53 Wis. 292; Lee v. Grimes, 4 Col. 185; Harvey v. Head, 68 Ga. 247.

*actum est (supple et judicatum sit nihil a seruo meo deberi) si postea te cum eo nomine agatur excipiendum est de rei judicatu."*

The creditor cannot in this case claim that it is *res inter alios judicata*; for it is the essence of the engagement of a surety that his obligation depends upon that of his principal, and the surety cannot owe more than the principal, and that he may set up all the exceptions *in rem* which could be pleaded by the principal. It follows that whatever has been decided in favor of the principal must be taken to be decided in favor of the sureties, who ought, in this respect, to be considered the same party, and *vice versa*; when the judgment was against the principal the creditor can make it available against the surety, and demand that it be carried into execution against him, but the surety is allowed to appeal from the judgment. "*Admittitur ad provocandum fidejussoribus pro eo pro quo inter interveniunt.*" Sureties can make no defense that could not be made by their principal. The measure of his responsibility is the measure of theirs, and any act of the principal which estops him from setting up a defense personal to himself operates equally against his surety.<sup>1</sup>

So a judgment obtained in a suit by the joint owners of property against a sheriff and the sureties on his bond for a sale, on execution, against one of the joint owners of the entire interest in such property, at a place not authorized by law, is a bar to a suit by the joint owners who were not parties to the execution, for a conversion of such property arising from such sale, although the former action was not in strictness of law maintainable, and the court, by an erroneous ruling, diminished the plaintiff's recovery to nominal damages.<sup>2</sup>

§ 163. Judgments and decrees bind parties and privies only; where, therefore, one binds and obliges himself that the defendant in one attachment suit would cause the property levied upon and replevied by the said bond, to be forthcoming to abide the final order of the court in the said suit, he connects himself in privity with the proceeding therein, and makes the record of

<sup>1</sup> Patterson's Appeal, 48 Pa. St. 345; McCabe v. Rainey, 32 Ind. 309; Seaver v. Young, 17 Vt. 658, Charles v. Haskins, 14 Iowa. 471; Boone Co. v. Jones, 54 Iowa, 229, S. C., 37 Am. R. 699; McCloskey v. Wingfield, 32 La. Ann. 38; Baker v. Baldwin, 48 Conn 131.

<sup>2</sup> Hopkinson v. Shelton, 37 Ala 306.

the judgment conclusive against him.<sup>1</sup> So where an appellant seeks the jurisdiction of a court and executes a bond in replevin, in order to avail himself of it, he cannot object to that jurisdiction in an appellate court, for by his acts and admissions he acknowledges the jurisdiction and is estopped by them.<sup>2</sup> The sureties in an undertaking on appeal from a judgment are estopped by the recitals in their undertaking from questioning the correctness of the amount of costs in the judgment appealed from when sued under their undertaking.<sup>3</sup> So where an order is made by a surrogate for the payment of money by an administrator, and the order is affirmed on appeal, the sureties on the administrator's bond are estopped by such affirmance, equally with the administrator, from alleging any defect or error in the proceedings before the surrogate.<sup>4</sup> A judgment for money due at a certain time against the party making the settlement is conclusive in respect to the parties to it, and cannot be impeached collaterally, nor can it be questioned on a creditor's bill.<sup>5</sup> A judgment against a defendant is conclusive on the bail; he is estopped from averring that it was rendered for more than the amount due, because his principal suffered judgment to be taken by default, or through negligence; but if he can show fraud or collusion between the parties to the action, he can go behind the judgment.<sup>6</sup> The same principle is applicable to sureties on injunction, attachment, stay and forthcoming bonds, and in some States, on the ground of public policy, it includes the official bonds of administrators, constables, guardians, sheriffs, assignees, and trustees.<sup>7</sup>

<sup>1</sup> *Cole v. Reilly*, 28 Ga. 431; *Hunter v. McCraw*, 31 Ala. 518; *Wasson v. Cone*, 10 C. L. N. 168; *Falmstock v. Gilham*, 77 Ill. 637; *Warner v. Mathews*, 18 Ill. 83; *Gelston v. Whitesides*, 3 Cal. 309; *Miller v. Elliott*, 9 Ind. 484; *Patten v. Caldwell*, 1 Doll. 419; *The Church v. Barker*, 18 N. Y. 463; *Brown v. Sprague*, 5 Den. 515; *Towle v. Towle*, 46 N. H. 422.

<sup>2</sup> *Bates v. Williams*, 43 Ill. 494; *Love v. Rockwell*, 1 Wis. 382.

<sup>3</sup> *Levi v. Dorn*, 28 How. Pr. 217; *Keller v. Beder*, 6 J. J. Marsh. 655.

<sup>4</sup> *Biggot v. Bulger*, 2 Duer, 160; *Shelton v. Carlton*, 3 McCord, 412.

<sup>5</sup> *Mattingly v. Nye*, 8 Wall. 370.

<sup>6</sup> *Parkhurst v. Summer*, 23 Vt. 538.

<sup>7</sup> *Paul v. Witman*, 3 W. & S. 410; *Morrison v. Mullen*, 31 Pa. St. 12; *Barringer v. Allison*, 78 N. C. 79; *Lownes v. Hunter*, 2 Head, 343; *May v. Johnson*, 3 Ind. 449; *Brander v. Bobo*, 12 La. Ann. 616; *Bush v. Hampton*, 4 Dana, 83; *Garber v. Commonwealth*, 7 Pa. St. 265; *Commonwealth v. Evans*, 8 Watts, 390; *Masser v. Strickland*, 17 S. & R. 354;

§ 164. A cause is held to be decided between the same parties, not only when the same persons have appeared as parties themselves, but also when they have appeared by their guardians or other legitimate administrators or representatives. Thus if the guardian of a minor brings an action and is defeated, and the minor, after arriving at the age of majority, brings an action for the same matter he may be precluded by the *exceptio rei judicata*, for he is the real party in interest in the former action,<sup>1</sup> and, in the absence of fraud or collusion, minors properly represented are bound as fully as if they had been majors and personally cited. Representation in courts of justice is a necessity of civilized society, and the acts or neglects of the representative must in some degree be binding upon the party represented. And persons under disability at the time of a judicial proceeding to which they are parties, represented by their guardians and agents, are bound upon the knowledge of such guardians or agents.<sup>1</sup> Judicial acts are obligatory on infants unless they avoid them by direct proceedings, and an infant is estopped from gainsaying the record in a collateral action.<sup>2</sup> Thus an infant being liable for his *torts* gave bond with surety to prevent being imprisoned; his surety paid the fine and costs and took judgment over against the minor. This judgment, though arising out of a civil contract is valid, and binding on the minor. In many States by statutory provision infants may within a certain time after attaining their majority cause judgments and decrees to be set aside upon grounds by law provided. In case of a failure to avail themselves of such provision they are concluded in the same manner as parties *sui juris*. Whenever any person, even an infant, does that which by law he is compelled to do, he is bound.<sup>3</sup>

Sullivan v. Pierce, 10 Ark. 500; Towle v. Towle, 46 N. H. 432; Eimer v. Richards, 25 Ill. 289.

<sup>1</sup> Hieroman v. Louisiana, 34 La. Ann. 805; Winchester v. Winchester, 1 Head, 460; Sheffield v. Buckingham, Harl. Ch. 684; Townsend v. Cox, 45 Mo. 401; Kindell v. Titus, 9 Heisk. 727; Porter v. Robinson, 3 A. K. Marsh. 254; Martin v. Weyman, 26 Tex. 460; Fulbright v. Carnefex, 30 Mo. 423.

<sup>2</sup> Dial v. Wood, 9 Baxt. 296; Beeler v. Bullet, 3 A. K. Marsh. 289; Patchin v. Cromach, 13 Vt. 130; Austin v. Seminary, 8 Met. 196; Porter v. Robinson, 3 A. K. Marsh. 253; Allison v. Taylor, 6 Dana, 87; Bloom v. Burdick, 1 Hill, 30.

<sup>3</sup> Willard v. Willard, 56 Pa. St. 119; Williamson v. Johnson, 4 Mon. 63; Holley v. Acre, 23 Ala. 603; King v. Norman, 4 C. B. 884; Bergen v. Williams, 4 McLean, 125; Grace v.

Where an action is brought against an infant and he is represented in court by his duly constituted guardian, or the court appoints a guardian *ad litem*, a judgment rendered in such action cannot be avoided. The weight of authority is, that an infant defendant is as much bound by a decree in equity or a judgment at law as a person of full age; and if a judgment or decree be absolute against him he will not be permitted to question it, except upon the same grounds that a judgment can be questioned by parties *sui juris*; that is, for fraud, collusion, or error.<sup>1</sup>

§ 165. The rights and interests of infants and minors are as subject to the jurisdiction of the courts, as the rights and interests of an adult, and must, of necessity, be the matter of frequent litigation. Because of his incapacity, the courts observe a vigilance and jealousy in adjudicating against him, not extended to suitors who are *sui juris*. A guardian *ad litem* is appointed by the court, who, in the presence of the court, makes full defense, and has not capacity to impair the defense, by any act, admission or omission. The protective care of the court and the fidelity of the guardian, is a security against an unjust judgment. The fair and just presumption after judgment is that the court has observed its duty and compelled observance from the guardian. When the judgment is collaterally assailed, unless presumptions are indulged against the court rendering it, conclusiveness must

Martin, 47 Ala. 135; Watts v. Gale, 20 Ala. 325; Douglas v. Howland, 24 Wend. 35; Drummond v. Prestman, 12 Wheat. 516; Stovall v. Banks, 10 Wall. 583; Morgan v. Thorn, 7 M. & W. 400; Holmes v. Dabbs, 15 La. Ann. 501; Harris v. Youman, 1 Hoff. Ch. 178; Right v. Miller, 1 Sand. Ch. 103; Lloyd v. Malone, 23 Ill. 43; Kuchenheiser v. Beckert, 41 Ill. 175; Richmond v. Tayleur, 1 P. Wms. 735.

<sup>1</sup> Kegans v. Alcum, 9 Tex. 25; Ludwicke v. Fair, 7 Ired. 422; Far-  
ran v. Sherwood, 17 N. Y. 227; Crog-  
han v. Livingston, 17 N. Y. 218;  
Althouse v. Radde, 8 Bosw. 410;  
Gregory v. Molesworth, 3 Atk. 626;  
Broke v. Hertford, 2 P. Wms. 519;

Waring v. Reynolds, 3 B. Mon. 59;  
Marshall v. Fisher, 1 Jones L. 111;  
Pond v. Doneghy, 18 B. Mon. 558;  
Smith v. Ferguson, 3 Met. (Ky.) 424;  
Ralston v. Luce, 8 Iowa, 23; Bennett  
v. Hill 2 Sch. & L. 515; Porter v. Rob-  
inson, 3 A. K. Marsh. 254; Wrisley v.  
Kenyon, 28 Vt. 25; Joyce v. Mc-  
Avoy, 31 Cal. 273; Wills v. Spraggin,  
3 Grant 567; Smith v. McDonald,  
42 Cal. 484; Gwinn v. Williams, 39  
Ind. 374; Wright v. Miller, 1 Sandf.  
Ch. 105; Bustard v. Gates, 1 Dana,  
429; Beningfield v. Reed, 8 B. Mon.  
105; Preston v. Dunn, 25 Ala. 507;  
Cuyler v. Wayne, 64 Ga. 78; Mc-  
Anear v. Epperson, 54 Tex. 220; S.  
C., 38 Am. R. 635.

be attached. If a judgment or decree rendered by a court of competent jurisdiction could be lessened in force, on account of the infancy of the parties, there is nothing that would restrain one tribunal from questioning and denouncing the judgment rendered by another. If a judgment of a court of competent jurisdiction could be thus questioned, that same judgment when affirmed on appeal could be questioned by any inferior court upon the same grounds. Such judgments must operate as a bar against infants, until they are successfully impeached on grounds available if they were adults. But where there is neither a natural or appointed guardian to protect the infant's rights, a judgment rendered against him is absolutely void.<sup>1</sup> This doctrine is applicable to lunatics, and judgments are neither void or voidable,<sup>2</sup> the only remedy being in equity, and this rule is applicable against dead persons.<sup>3</sup> In a late case it was said that a judgment of a court having jurisdiction of the subject matter and the parties, entered on default against a defendant after his death without knowledge thereof, if otherwise valid, is a bar in another action by the same plaintiff against the defendant's administrator.<sup>4</sup>

§ 163. A judgment against an administrator in an action to try title to real estate is conclusive in a subsequent action between the same party and the heirs;<sup>5</sup> it binds the heir to the same extent it does the administrator, and is conclusive upon his successor, who cannot set it aside;<sup>6</sup> on his sureties, when in his favor in an action on his bond<sup>7</sup> and when against them in a joint action from which he appeals and they do not<sup>8</sup> and the amount of the judgment is reduced, but why this should be is a matter of doubt. If the liabilities of the sureties can not be greater than that of the

<sup>1</sup> Whitney v. Porter, 23 Ill. 445.

<sup>2</sup> Lamprey v. Nudd, 29 N. H. 299; Wood v. Bayard, 63 Pa. St. 320, Foster v. Jones, 23 Ga. 168; Walker v. Clay, 21 Ala. 797; Sternberg v. Schoolcraft, 2 Barb. 153; Robertson v. Lain, 19 Wend. 650; Clark v. Dunham, 4 Denio, 262.

<sup>3</sup> Coleman v. McAnnulty, 15 Mo. 173; Spalden v. Wathen, 7 Bush,

659; Stortzell v. Fullerton, 44 Ill. 108; Cair v. Townsend, 63 Pa. St. 202.

<sup>4</sup> Reid v. Holmes, 127 Mass. 326.

<sup>5</sup> Connolly v. Connolly, 26 Minn. 350, Thayer v. Hollis, 3 Met. 369.

<sup>6</sup> Steele v. Atkinson, 14 S. C. 154; S. C., 37 Am. R. 728; Meeks v. Vasault, 3 Sawyer, 206.

<sup>7</sup> State v. Coste, 36 Mo. 437; Hempstead v. Hempstead, 33 Mo. 134.

<sup>8</sup> Pierce v. Chapman, 31 Ga. 674.

principal, the rule is that his liability is the measure of theirs. In a late case it is said: "the administrator is the sole representative of the personal estate of the deceased. A judgment to which he is a party, regularly obtained, in the absence of fraud or collusion, binds the estate to the extent of the personal property, and is conclusive upon all claimants of the personality;" but *prima facie* as to real estate, the heirs and devisees may question any item included in the judgment against an administrator.<sup>2</sup> So where a suit was pending against B., when she died, to recover attorney's fees for services in a cause wherein B. had recovered a judgment for \$25,000, her administrator having then been made a party, such proceedings were had that the sum of \$5,000 was allowed the attorneys, and a decree entered establishing a lien therefor upon the judgment. The attorneys afterwards, by petition, applied for an order upon the administrator, to compel him to pay their allowance out of the proceeds of the judgment as a preferred claim, and the other creditors of the estate were made defendants to the petition. The original decree establishing the lien, being unreversed, was an adjudication which bound all creditors of the estate, though not parties thereto, the administrator being their proper representative, and, as to them, the trustee of an express trust, and however erroneous, such creditors could not question it collaterally.<sup>3</sup>

§ 167. A judgment against an executor or administrator, whether by default,<sup>4</sup> or by confession,<sup>5</sup> or on demurrer,<sup>6</sup> or upon verdict, or upon any plea pleaded by the executor or administrator, except *plene administravit*, or admitting assets to such a sum and *reins ultra*,<sup>7</sup> is conclusive upon him that he has

<sup>1</sup> Wood v. Johnson, 13 Ill. App. 548.

<sup>2</sup> Stone v. Wood, 16 Ill. 177; Alston v. Munford, 1 Brock. 266; Steele v. Linneberger, 59 Pa. St. 308; Deneile v. Stump 8 Pet. 528.

<sup>3</sup> Blankenbaker v. Bank, 65 Ind. 459.

<sup>4</sup> Mason v. Peter, 1 Mumf. 437; Dickson v. Wilkinson, 3 How. 57; Barachffe v. Griscom, 1 N. J. L. 165;

Mosier v. Zimmerman, 3 Humph. 62.

<sup>5</sup> People v. Judges, 4 Cow. 445; Powell v. Myers, 1 D. & B. Eq. 502; Freeland v. Royall, 2 H. & M. 575; Worsham v. McKenzie, 1 H. & M. 312.

<sup>6</sup> Rock v. Leighton, 1 Salk 320; Leonard v. Simpson, 2 Bing. N. C. 176.

<sup>7</sup> Ramsden v. Jackson, 1 Atk. 292; Erving v. Peters, 3 T. R. 655.

assets to satisfy such judgment.<sup>1</sup> Where a *cestui que trust* consents that part of the trust property may be exchanged for other property by the trustee, and upon a bill filed by the trustee, the exchange is passed upon by a special jury and the chancellor and ratified by a decree, the *cestui que trust* is estopped.<sup>2</sup>

§ 168. According to the Roman law, the right of the legatees depended upon that of the instituted heir, and therefore a judgment against the heir declaring the will to be void was not regarded as *res inter alios judicata* with respect to the legatees, and might be used against them, they being considered, on account of the dependency of their right, as in some degree the same parties; but they were allowed to appeal from the judgment. "*Si haeres institutus victus fuerit ab eo, qui de inofficioso testamenta agebat, legatarius et qui libertatem acceperunt, permittendum est appellare, si quaeruntur per collusionem pronunciatum; sicut divus prius rescripsit.—Idem rescripsit legatarios causam appellationis agere posse.*" It was otherwise with respect to a judgment, which, upon demand of a legatee, declared the will to be void and dismissed the proceeding; this, with respect to the other legatees, was regarded as *res inter alios judicata*, which could not be made effectual against them, and from which it was not necessary for them to appeal. "*Cum res inter alios judicatae nullis aliis praejudicium faciant; ex eo testamento ubi libertas data est, vel legato agi potest licet ruptum vel vitium aut non justum dicatur testamentum; nec si superatus fuerit legatarius, praejudicium libertati sit.*" The reason for the distinction is that the right of a legatee did not depend upon that of their co-legatee, against whom the judgment was rendered, as it did upon that of the instituted heir. "*Cum ab institutione heredis pendeant omnia quae testamento continentur.*"

<sup>1</sup> Shaw v. McCameron, 11 S. & R. 252; Earl v. Hinton, 2 Stra. 732; Newcomb v. Gosse, 1 Met. 333; Platt v. Robbins, 1 Johns. Cas. 278; Judge v. Lane, 50 N. H. 556; Huger v. Dawson, 3 Rich. 328; Dorsey v. Bland, 1 Bland, 463; Ellicott v. Welch, 2 Bland, 242; Post v. Mackall, 3 Bland, 486; Lenoir v. Winn, 4 Dess. 65; Rock v. Leighton, 1 Salk. 320.

<sup>2</sup> Leonard v. Simpson, 2 Bing. N. C. 176; Carr v. College, 32 Ga. 557; Johnson v. Robertson, 31 Md. 416; Willink v. Canal Co., 4 N. J. Eq. 377; Van Vechten v. Terry, 2 Johns. Ch. 197; New Jersey, &c. Co. v. Ames, 19 N. J. Eq. 507; Adair v. New River Co., 11 Ves. 429; Cockburn v. Thompson, 16 Ves. 321; Harrison v. Stewartson, 2 Hare, 535; Newton v. Egmont, 5 Sim. 130.

§ 169. Although a successor is considered a party to a judgment for or against the person under whom he claims, the latter is not *eo converso* a party to a judgment for or against the former, and therefore such a judgment cannot be taken advantage of by or against him. "*Exceptio in rei judicata.*" "*A per me auctor ad emptorem transire solere; retro autem ab emptore ad auctorem reverti non debere,*" thus, "*Si inter alios rem vendideris, ego eundem ab emptore petere et vice versa; potui tibi non opponam exceptionem, ut si ea res iudicata non sit inter me et eum cui vendidisti dict. Item si victus fuero tu adversus me exceptionem non habebis.*" A judgment as to all who are not parties to it, either by themselves or those under whom they claim, is *res inter alios iudicata*, and cannot be made available either by or against them. And this is the case, although the question is the same, to be decided upon the same principles and depending upon the same facts. It is thus stated by Paulus: "I intrust a sum of money with a person who has left several heirs. I demand from one of those heirs the restitution of his share, and the judgment is rendered against me, if I bring an action against the other heirs for the shares for which they are liable, they cannot oppose against me in such action the judgment in favor of their co heir, because with respect to them, it is *res inter alios adjudicata*, which cannot give them any right, although the question is the same as that already decided against me, in favor of the co-heir, and depends upon the same facts, that is to say, whether I really intrusted the money to the deceased, or whether he returned it to me. "*Si cum herede depositi actum sit tamen et cum ceteris hæredibus recte agitur, nec exceptio rei iudicæ ei proderit, nam etsi ead. inquestio in omnibus judiciis vertitur, tamen personarum mutatio cum quibus singulis suo nomine agitur aliam atque aliam rem facit.*"

§ 170. This principle that the authority of *res iudicata* only extends to the parties to the cause, and their successors is connected with another which has been already cited, viz., that the authority of *res iudicata* only applies to the same matter in issue in the prior judgment. Thus, in the preceding illustration, the judgment in favor of one of the heirs does not afford the *exceptio rei iudicæ* to the others, not only as being *res inter alios iudicata*, but also because the object of the demand is different. For

although both demands are for the same debt they are not for the same part. The judgment in favor of one heir has decided nothing with respect to the parts of the others, and therefore as to them cannot have the authority of *res judicata*. This is what is meant by the jurist in the law already cited. "*Mutatio personarum cum quibus singulis suo nomine agitur aliam atque aliam rem facit.*" So where a creditor has left several heirs, a judgment in favor of the debtor upon the demand of one cannot be made available against the others, it being as against them *res inter alios judicata* and a different thing; for the parts claimed by the other heirs, although parts of the same debts, are not the same parts which were previously litigated. It is otherwise when the thing due to several heirs or other co-proprietors is something indivisible, such as an easement or a right of servitude, for as this is not susceptible of parts of division, each is creditor or co proprietor of the whole, and therefore the judgment upon the cause of action of any one of them is the same as the cause of action of the others, and is *eadem res*, and therefore it is not *res inter alios judicata* with respect to the others; from the indivisibility of their right they are regarded as the same party, and therefore the authority of the judgment extends to all. If it was in favor of their co proprietor, or joint creditor, they are entitled to the benefit of it; if it was rendered against him they are bound by it, nevertheless; if the judgment was fraudulently obtained or given by collusion, the others are permitted to renew the litigation. "*Si de communi servitute quis bene quidem deberi intendit sed aliquo modo litem perdidit, culpa sua non est æquum hoc cæteris damno esse, sed si per collusionem cessit litem adversario; cæteris dandum esse actionem de dolo (that is, as explained) replicationem de dolo contra exceptionem rei judicatae.*" (The judgment against one of several creditors or co-proprietors of an indivisible right may be avoided by the others, for they are not obliged to allege collusion in order to avoid its effect; they may appeal from the judgment, though the mediate party has acquiesced in it.)<sup>1</sup>

§ 171. The same rule applies in case of a judgment against the ancestor; it has the effect of *res adjudicata* as against the

<sup>1</sup> Pierce v. Chapman, 31 Ga. 674

heirs. The successors of the parties, those who succeed to their rights, are regarded the same as the original parties, therefore, a judgment for or against them has the same effect as it had with respect to those whom they succeeded. This is indubitable with respect to heirs and other universal successors who are in *lego hereditum*. In real actions, the person who succeeded another in the subject of the action, even by a particular title, is regarded as the same party. Thus, if you claim a certain estate from A., the judgment in his favor will give the *exceptio rei judicate* to any person afterwards purchasing from him, for the purchaser is considered the same party: "*Cum ego et tu heredes Titii et huiusmodi si tu partem fundi, quem totum hereditarium dicitur a symponio petitis, et ceteris juris; nos eundem partem a symponio emimus; agenti mecum familiae ceteris modis, exceptio obstat; quia res judicata sit inter te et ceteros, non inter nos; et non etsi ante eundem rem petitis et agerem familiae ceteris modis; obstat exceptio quod res judicata sit inter me et te.*" Upon the same principle, if an action is brought by A. against B., the owner of an adjoining estate, for the purpose of compelling B. to remove a building which throws the water from B.'s land on to A.'s, and after judgment A. sells his estate to C., C. is entitled to the benefit of the *exceptio rei judicate*. "*Si agerem cum vicino aqua pluvie ascenda, deinde, alteruter nostrum pradium condiderit, et emptor agat, vel cum eo agatur, hanc exceptio non est; sed de eo opere, quod jam erat factum, cum judicium acciperetur.*" There can be no question but what a purchaser has the same right as the seller to the benefit of the *exceptio rei judicate* who would be bound to defend any action against him and to save him harmless from the consequences of it. Although this principle is not generally applicable to purchasers without warranty, they are nevertheless to be considered as the same party with the persons to whom they have succeeded in the property in question, and have the same benefit of the judgment. Thus if A. obtains judgment against B. in regard to the ownership of a certain estate and that it is not subject to a certain easement claimed by B., and B. afterwards institutes another action against a party succeeding to A.'s estate, such party is entitled to the benefit of the *exceptio rei judicate* against B. as the successor of A.'s rights. The reason for this rule is that when a party is contracting with

another for the disposal of his property, he acts in behalf of his successors as well as himself, and when engaged in litigation in regard to anything, the party is contending for his successors as well as for himself; and the right arising from the judgment, ought to pass to all our successors, *eadem enim debet esse ratio judiciorum in quibus videmur quasi contrahere conventionem*. As a successor is entitled to the benefit of a judgment in favor of the person under whom he claims, a judgment against the latter may *vice versa* be opposed to the former, provided the title has only vested subsequent to the proceeding in which judgment was rendered. Thus A. claims an estate from B. and judgment is rendered against A. A. afterwards mortgages it to C.; C. subsequently commences an action to foreclose his mortgage. B. may plead the *rei judicatæ*, as the judgment in his favor is conclusive upon the title of A., and he has no right to mortgage B.'s estate. But if the mortgage had been executed prior to the commencement of the action, a judgment against A. that he was not, at the time when the action was commenced, the owner of the land, does not decide that he was not at the time of executing the mortgage; and C. may, notwithstanding such judgment, show, that at the time his lien accrued, A. was the owner, and since that time had ceased to be. "*Si rem quam a te petierat Titius pignori Seio dederit. deinde Seius pignoratitia adversus te utitur; distinguendum est quando pignori dedit Titius, et siquidam ante quem peteret; non oportet ei nocere exceptionem, nam et ille petare debint, et ego salvam habere debeo pignoratitiam actionem, sed si postea quam petit, pignori dedit, magis est, et noceat exceptio rei judicatæ.*" "*Si superatus sit debitor qui rem suam vindicabat, quod suam non probat; aequè servanda erit creditori actio serviana, probanti, res in bonis eo tempore, quo pignus contrahebatur illius fuisse, sed et si victus debitor vindicans hereditatem, iudex actiones serviana, neglecta de hereditate, dicta sententia pignoris causam inspicere debet, per injuriam victus apud iudicium, rem quam petierat, postea pignori obligavit; non plus habere credit or potest, quam habet, qui pignus dedit, ergo sum movetur rei judicatæ exceptione; tametsi maxime nullam propriam, qui vicit, actionem coercere possit: non enim quod ille non habuit, sed quid in ea re quae pignori data est, debitor habuerit considerandum est.*"

§ 172. A judgment against an heir or devisee is a bar to a suit against an executor or administrator for the same demand. So a cestui que trust is bound by a decree against his trustee, as in the foreclosure of modern railway mortgages.<sup>1</sup> A judgment against the executor is not conclusive in a subsequent suit against the heir to render the lands of the testator liable to the debt.<sup>2</sup> So, a decree for the distribution of a common fund among those interested, does not estop one who was not a party to the suit, and has been guilty of no laches. But it protects the assignee who makes the distribution under it pursuant to the decree; but one who was not a party to the suit, and has not been negligent, may follow the fund and reclaim his proportion from the distributees.<sup>3</sup>

§ 173. A judgment against one of the joint makers of a promissory note, or a part of several joint debtors, is a bar to an action against both on the original joint promise,<sup>4</sup> by the same plaintiff, because the judgment extinguishes the note. Even without satisfaction, a judgment against one of two or more joint contractors is a bar to an action against the others. Within the principle of the maxim, *transit in rem judicatum*, the cause of

<sup>1</sup> *Coreoran v. Chesapeake, &c. Co.*, 94 U. S. 741.

<sup>2</sup> *Garnett v. Macon*, 6 Call, 308; *Stone v. Wood*, 16 Ill. 177; *Dorr v. Stockdale*, 19 Iowa, 269; *Moss v. McCullough*, 5 Ill. 131; *Alston v. Mumford*, 1 Brock, 266.

<sup>3</sup> *Gooding v. Oliver*, 17 How. 294; *Williams v. Gibb*, 17 How. 239.

<sup>4</sup> *Mason v. Eddred*, 6 Wall. 231; *Sedam v. Williams*, 4 McL. 51; *Bonesteel v. Todd*, 9 Mich. 371; *Archer v. Herman*, 21 Ind. 29; *Ward v. Johnson*, 13 Mass. 118; *Spencer v. Deaith*, 43 Vt. 98; *Thomas v. Rumsey*, 6 Johns. 26; *People v. Harrison*, 82 Ill. 81; *Suydam v. Barber*, 18 N. Y. 468; *Brady v. Reynolds*, 13 Cal. 31; *Wann v. McNulty*, 7 Ill. 359; *Smith v. Black*, 9 S. & R. 142; *Philson v. Bamfield*, 1 Brev. 202; *Benson v.*

*Paine*, 17 How. P. 407; *Henderson v. Reeves*, 6 Blitch. 101; *King v. Hoare*, 2 D. & L. 382; *Maghee v. Collins*, 27 Ind. 83; *Kingsley v. Davis*, 104 Mass. 178; *Mitchell v. Brewster*, 28 Ill. 163; *Barnett v. Juday*, 38 Ind. 86; *Harris v. Dunn*, 18 U. C. Q. B. 352; *Bank v. Hart*, 5 Ohio St. 34; *Root v. Dill*, 38 Ind. 169; *Köttering v. Norville*, 39 Ind. 183; *Higgins in re*, 3 De G. & J. 33; *Benson v. Paine*, 2 Hitt. 522; *Gilmore v. Carr*, 2 Mass. 171; *Hallowell v. McDowell*, 8 U. C. C. P. 21; *Tinkum v. O'Neal*, 5 Neb. 93; *Robertson v. Smith*, 18 Johns. 459; *Ward v. Johnson*, 13 Mass. 148; *Smith v. Black*, 9 S. & R. 142; *King v. Hoare*, 13 M. & W. 495; *Gibb v. Bryant*, 1 Pick. 118; *Lewis v. Williams*, 6 Whart. 264; *Anderson v. Levan*, 1 W. & S. 331; *Billings v. Consequa*, 1 Pet. C. C. 303.

action being changed into matter of record. Judgment in such a case is a bar to a subsequent action against the other joint contractors, because the contract being joint and not several, there can be but one recovery. Consequently the plaintiff, if he proceeds against one only of the joint contractors, loses his security against the others, the rule being that by the recovery of the judgment, though against one only, the contract is merged and a higher security substituted for the debt.<sup>1</sup> But where a contract is joint and several, a judgment against one is no bar to a subsequent action, nor is the judgment against all, jointly, a bar to a subsequent action against one alone. For when a party enters into a joint and several obligation, he in effect agrees that he will be liable to a joint action and to a several action for the debt. The contract does not merely give the obligee an election of the one remedy or the other, but entitles him at once to both, though he can have but one satisfaction.<sup>2</sup>

§ 174. In regard to married women there are many questions which at common law might be profitably examined, and in some few States there may be found decisions which, proceeding upon the common law doctrine that a married woman cannot make a valid or binding contract, and that a judgment being the highest species of contract, or in the nature of a contract, ergo she is not concluded by a judgment. At common law she cannot be sued. It is otherwise in equity. No personal decree can be entered against her, but against her separate estate only. Where the common law is in force this rule is

<sup>1</sup> *Sessions v. Johnson*, 95 U. S. 347; *Mason v. Eldred*, 6 Wall. 231; *King v. Hoare*, 13 M. & W. 494; *U. S. v. Ames*, 99 U. S. 35; *Gibbs v. Bryant*, 1 Pick. 118; *Higgins in re*, 3 De G. & J. 33; *Ward v. Johnson*, 13 Mass. 48; *Robertson v. Smith*, 18 Johns. 459; *Brown v. Johnson*, 13 Gtatt. 644; *Bank v. Hart*, 5 Ohio S. 33; *Pfau v. Lorrain*, 1 Cin. 73; *Roby v. Ramseberger*, 27 Ohio S. 674; *Harvey v. Wild*, L. R. 14 Eq. 38; *Trafton v. U. S.*, 3 Story C. C. 646.

<sup>2</sup> *U. S. v. Price*, 9 How. 83; *Charles v. Haskin*, 11 Iowa, 329; *Mitchell v. Libbey*, 33 Me. 74; *King v. Hoare*, 13 M. & W. 504; *Armstrong v. Prewett*, 5 Miss. 496; *Elliott v. Porter*, 5 Dana, 299; *United States v. Cushman*, 2 Sumner, 426; *Higgins' Case*, 6 Co. 44; *Ward v. Johnson*, 15 Mass. 148; *Buckland v. Johnson*, 15 C. B. 164; *Price v. Moulton*, 10 C. B. 570; *Harlan v. Berry*, 4 Greene (Iowa), 212; *Lechmere v. Fletcher*, 1 C. & M. 623; *Dick v. Tollhausen*, 4 II. & N. 695; *McReady v. Rogers*, 1 Neb. 24.

the correct one. But in England, and in almost every one of the United States, married women have by statute been relieved of their common law disabilities. *She may now contract, sue and be sued, as if she were sole.* If she may sue, she must be bound by a judgment in her favor; if it is against her, she must be bound by it also. The statutes emancipating married women have abrogated the common law doctrine, and the maxim *cessante ratione legis cessat et ipsa lex* applies. A married woman may now appoint an agent or attorney; she may employ counsel, may pro-secute or defend actions in courts of justice, and wherever she may contract she may be bound by a judgment against her. It is not a question of principle resting upon the decision of a common law court, but a question of statutory capacity. When a statute, therefore, removes the common law disabilities, and gives a married woman the same rights in all respects as if she were unmarried, she takes those rights subject to the same burdens as her unmarried sister. If she admits a demand to exist against her, as alleged in the complaint, by failure to defend the action, her default or consent is as valid or binding upon her as upon any one *sui juris*.<sup>1</sup>

There is another reason why a married woman should be concluded by a judgment against her, and that is upon the ground of waiver. It is unquestioned that no one can be bound by a judicial proceeding without being notified of its pendency. Every person is entitled to his or her day in court. If coverture at common law is a defense, a bar to the rendition of a judgment against a married woman; if she can avoid a judgment by setting up this plea—and it is well settled that it is a valid defense when pleaded; if she is served with process and fails to set up her defense, why should she in preference to any one else be permitted to avail herself of a remedy which would have successfully defeated the action? If there is fraud or collusion in obtaining a judgment, she as well as every other person can avoid it. Fraud vitiates a judgment against any one. If every available defense

<sup>1</sup> Spalding v. Wathen, 7 Bush, 659; Baxter v. Dear, 24 Tex. 17; Howard v. North, 5 Tex. 290; Van Metre v. Wolf, 27 Iowa, 341; Green v. Bran-

ton, 1 Dev. Eq. 500; Gambetta v. Brock, 41 Cal. 71; Patterson v. Fraser, 5 La. Ann. 586; Elson v. Dowd, 40 Ind. 300; Guthrie v. Howard, 82 Ia. 54.

not set up is merged in a judgment, except counter claims, set-offs, and such are excepted by statute, there is no reason why the defense of coverture should be excepted by courts when it is not by statute. Coverture—like infancy, usury, limitations, etc.,—is a personal plea, which may be waived. The doctrine may be stated in the language of the Supreme Court of Michigan: "A married woman is allowed, in many cases, to contract and to sue and to be sued, as though she were unmarried, and her competency to assert and maintain her rights either as plaintiff or defendant is fully acknowledged. In case she is sued upon a contract she has no capacity to make, or against which she has some other valid objection, the door of justice is open to her, and the law invites her to explain her case and expose her objection reasonably and in the due course of proceeding. The act or matter may not be enforceable against her in case of objection: yet, if she refrains, and suffers the case to go on to judgment against her, and still more, suffers the judgment to stand, the circumstance that she was not originally bound will not suffice to render the judgment void. In case it has not been impeached on error, or appealed, it can not be repudiated; and when recourse is had to legal process to enforce it, its conclusiveness can not be brought into question on account of the invalidity of the cause of action or the right which she held to successfully resist it. We are aware that a different doctrine prevails in some courts of high authority, and it is possible that reasons exist in their systems for peculiar rules. The weight of authority is otherwise, and we are satisfied that our regulations require us to concur with it."<sup>1</sup>

She cannot plead ignorance of her legal rights; everyone is presumed to know the law, and there is no exception to this rule. It may be convenient to plead such a defense when a party has waived her rights after full opportunity to protect them has been afforded by law in an impartial tribunal. "The law does not manifest sympathy; but dispenses even-handed justice. Enthroned in its majesty, it smiles and frowns on all alike. Submission to its authority is incumbent on all." If married women will insist on being relieved by law from all disability and placed upon an equal footing with men and unmarried women, they must assume the burdens as well as the benefits.

<sup>1</sup> Wilson v. Coolidge, 42 Mich. 112.

§ 175. At common law personal judgments against married women upon their contracts rendered upon default or confession, have been held void, and this is the rule in some States,<sup>1</sup> notwithstanding the effect of emancipation laws placing them upon the same footing as unmarried women, making them *sui juris* as to all transactions concerning her own property, allowing her to embark in business and carry on trade as if she were single. It is difficult to forget that the common law rules in regard to married women have been entirely changed. Courts are human, and they cannot forget that (*notwithstanding the statutes*) the dominion and influence of the husband is as great as it ever was, that a married woman is in this respect as ignorant and incapable of understanding her statutory rights and liabilities as an infant. Unaccustomed to the duties devolved upon the husband, to mercantile and legal matters she is now as dependent as she ever was, although she is by statute *sui juris*, yet in fact she is not. She is not educated with this object, her mode of life, her object in life, is not to make laws or break laws, nor is she a separate being from her husband; she looks to him to care for her, to protect her, and instruct her as to her legal rights. Yet, notwithstanding this, the law cannot so regard her, when a statute declares that she may sue and be sued in the same manner as though single; that she may accumulate, sell and dispose of property in the same way, irrespective of the control or dominion of the husband; that she may make contracts, &c., which she may enforce, and which may be enforced against her as if she were sole. The common law rule ceases, and the maxim *cessante causa, cessat effectus*, applies.

Proceedings in court bind a married woman the same as they do any other person; that is, she is estopped by them. A judicial proceeding to which a wife is a party of record, may be of such a nature that she will not be estopped by it.\* But, if she is prop-

<sup>1</sup> Bank v. Patee, 99 U. S. 331; Griffith v. Clark, 18 Ind. 457; Mallet v. Parham, 52 Wis. 94; Morse v. Tappan, 3 Gray, 411; Griffin v. Chadwick, 44 Tex. 574; Dorrance v. Scott, 3 Whart. 309; Wallace v. Rippon, 2

Bay, 112; Norton v. Meador, 4 Sawyer, 620; Casey v. Dixon, 51 Miss. 593; Bank v. Williams, 46 Miss. 629; Griffin v. Ragan, 52 Miss. 78; Shalcross v. Smith, 81 Pa. St. 132; Ferguson v. Reed, 45 Tex. 514.

\* Crenshaw v. Creek, 52 Mo. 98

erly sued, in a matter within the jurisdiction of the tribunal, a judgment on default binds her the same as it does any other person.<sup>1</sup>

§ 176. Where a married woman is served with a summons in a suit against her, and she confides her interest and defense to her husband, and he neglects to protect her interests,<sup>2</sup> or he selects a counsel for her and judgment is rendered against her, it is as binding as one against any other person, unless it be obtained by the fraudulent combination of the husband or counsel with the adverse litigant,<sup>3</sup> and where the declaration shows that the contract was made while she was unmarried, her coverture is no obstacle to the recovery of a judgment.<sup>4</sup> So where her property has been levied on by her husband's creditor and she interposes a claim for it, she is bound by the judgment.<sup>5</sup> So where she is made a party to proceedings in aid of execution, any order made in such proceedings will be binding on her.<sup>6</sup> So in an action to recover possession of a tract of land by a purchaser under a sale on foreclosure in an action against a husband and wife, the wife cannot resist the action to recover possession on the ground that the property is her homestead; that matter should have been presented in the original action, and if adjudicated in that suit the only remedy is by appeal or review in an appellate court.<sup>7</sup> While a promissory note of a married woman, executed during coverture, may be void, yet in an action thereon if she makes default and a judgment is rendered against her, she is forever estopped from denying or collaterally attacking it; or if she suffers judgment to be rendered against her in an action upon a note in which she is a co-maker with her husband, she cannot escape liability to the judgment by pleading her coverture.<sup>8</sup> A person is not concluded by a judgment or decree rendered in a judicial proceeding, he at the time having no legal capacity to sue

<sup>1</sup> Van Metre v. Wolf, 27 Ia. 341; Guthrie v. Howard, 32 Ia. 54.

<sup>2</sup> Keith v. Keith, 26 Kans. 26

<sup>3</sup> Vick v. Pope, 81 N. C. 22, Glover v. Moore, 60 Ga. 189.

<sup>4</sup> Travis v. Willis, 55 Miss. 557.

<sup>5</sup> Lewis v. Gunn, 63 Ga. 542.

<sup>6</sup> Schrauth v. Bank, 8 Daly, 106.

<sup>7</sup> Lee v. Kingsbury, 13 Tex. 68; Tadlock v. Eckles, 20 Tex. 282; Baxter v. Dear, 24 Tex. 17; Chilson v. Reeves, 29 Tex. 275.

<sup>8</sup> Burt v. Hill, 55 Ind. 419; Wolf v. Van Meter, 23 Iowa, 397; Guthrie v. Howard, 32 Iowa, 54.

or defend. In an action by one formerly a slave, for false imprisonment: Held, that the plaintiff was not bound by a decree of a Kentucky court adjudging her to be a slave, for the reason that by the law of that State a slave was not a competent party to a suit.<sup>1</sup>

§ 177. A judgment against one co-trespasser will not *pro se* bar an action against another for the same or a different asportation or conversion of the same property; and to make out a bar in such case it is necessary to show not only the first judgment, but also that it has been fully satisfied or released. The judgment alone does not vest in the defendant the title to the property converted.<sup>2</sup> A plaintiff may maintain separate actions and recover separate judgments against joint trespassers, and may elect to take the largest sum assessed, or to proceed against the solvent defendants, or, where no one of them is able or can be compelled to pay the whole of the judgment rendered against him, may accept part satisfaction from one and still look to the others for such balance as may be necessary to give him full legal compensation for the wrong suffered; but ordinarily when he has made his election he will be concluded by it. Where the injured party sues one of several wrong-doers and recovers a judgment, which he elects to enforce and which is in part satisfied, *he is stopped, in a subsequent action* against a different defendant for the same cause, to claim a greater sum in the way of damages than was adjudged to him in the first action. The plaintiff may defer his election by declining to enforce his judg-

<sup>1</sup> Wood v. Ward, U. S. C. C. S. D. Ohio, S. C., 8 C. L. J. 188.

<sup>2</sup> Lovejoy v. Murray, 3 Wall. 1; Matthews v. Menodges, 2 McLean, 115; Whitebury v. Westervelt, 9 N. Y. 598; Christian v. Hoover, 6 Yerg. 565; Elliott v. Porter, 5 Dana, 299; Shakers v. Underwood, 11 Br. 265; Blaun v. Crocheron, 19 Ala. 617, S. C., 20 Ala. 320; Dubose v. Marx, 52 Ala. 506; Collard v. R. R. Co., 6 F. R. 246; Brinsmaid v. Harrison, L. R. 6 C. P. 554; Atlantic Dock Co. v. Mayer, 53 N. Y. 464; Livingston v. Bishop, 1

Johns. 290; Osterhout v. Roberts, 8 Cow. 43; Stone v. Dickenson, 5 Allen 29; Murray v. Lovejoy, 2 Chf. 191; Sheldon v. Kibbe, 3 Conn. 211; Sanderson v. Caldwell, 2 Ark. 395; Sharp v. Gray, 5 B. Monr. 4; Jones v. McNell, 2 Bul. 466; Elliott v. Hayden, 104 Mass. 180; Morgan v. Chester, 4 Conn. 387; Page v. Freeman, 19 Mo. 421; Floyd v. Broune, 1 Rawle, 125; Knott v. Cunningham, 2 Sneed, 204; Elliot v. Porter, 5 Dana, 299; Blaun v. Crocheron, 20 Ala. 320; Hyde v. Noble, 13 N. H. 494.

ment, leaving the question of amount to which he is entitled an open one, until he sues and recovers against all who are liable to him, and then elect which judgment he will enforce; or he may sue upon his original cause of action and compel the defendant to rely, by plea or as matter of evidence, upon the first judgment and his election to enforce it, thereby estopping each party from questioning the correctness of that judgment. A judgment against a co-trespasser is conclusive upon both plaintiffs and defendants as to the amount of damages sustained by the plaintiffs. Thus, in a suit for the tortious conversion of property the defendant pleaded in bar the judgment of a bankrupt court in favor of the plaintiffs against a co-trespasser for the same conversion, and which had in the greater part been satisfied. *Held*, that the judgment of the bankrupt court against the co-trespasser is conclusive upon both parties in the second suit as to the amount of damages. A former recovery in trover, with satisfaction thereof, is a bar to an action of detinue against one claiming under the defendant, either before or after the rendition of such judgment. Thus, a judgment on a verdict in trover in favor of the defendant is conclusive on the plaintiff, in an action of detinue instituted by him against one claiming under said defendant, if the judgment was rendered before the defendant parted with the property, unless the plaintiff claims in the detinue suit on a title acquired after the rendition of such judgment.<sup>1</sup> So where separate actions are brought against two joint wrong-doers and judgment is obtained against one, which is satisfied, pending the action against the other, plaintiff is not entitled to a judgment, even a nominal one, to recover costs. The judgment and satisfaction in the first cause is pleadable in and a bar to the other action, and the defendant is entitled to costs.<sup>2</sup>

§ 178. This doctrine is contrary to the English one, which is thus stated: "If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to

<sup>1</sup> Thomason v. Odum, 31 Ala. 108.

<sup>2</sup> Savage v. Stevens, 128 Mass. 254.

another suit for the purpose of obtaining the same result. Hence the legal maxim, "*transit in rem judicatam*,"—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterward be divided into two. Thus it has been held, that if two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other for the same cause.

"Chief Justice Popham (Cro. Jac. 74), states the true ground. He says, 'If one hath judgment to recover in trespass against *one*, and damages are certain (that is, converted into certainty by the judgment), although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, *e contra*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the difference betwixt this case and the case of debt and obligation against two is, because there every of them is chargeable, and liable to the entire debt; and, therefore, a recovery against one is no bar against the other, until satisfaction.'

"We do not think that the case of a joint contract can, in this respect, be distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tort-feasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case, and not in the other; but, for the purpose of this decision, they stand on the same footing. Whether the action is brought against one or two, it is for the same cause of action.

"The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense: that if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint

bond of all, and the several bonds of each of the obligors, and gives different remedies to the obligee.

“If there be a judgment against one or two joint contractors, and the other is sued afterwards, can he plead in abatement or not? If he cannot, he would be deprived of a right by the act of the plaintiff, without his privity or concurrence, in suing and obtaining judgment against the other. If he can, then he may plead in bar the judgment against himself; and if that be not a bar, the plaintiff might go on, either to obtain a joint judgment against himself and his co-contractor, so that he would be twice troubled for the same cause; or the plaintiff might obtain another judgment against the co-contractor, so that there would be two separate judgments for the same debt. Further, the case would form another exception to the general rule, that an action on a joint debt, barred against one, is barred altogether; the only exception now being, where one has pleaded matter of personal discharge, as bankruptcy and certificate. It is quite clear, indeed, and was hardly disputed, that if there were a plea in abatement, both must be joined, and that if they were, the judgment pleaded by one would be a bar for both; and it is impossible to hold that the legal effect of a judgment against one of two is to depend on the contingency of both being sued, or the one against whom judgment is not obtained being sued singly, and not pleading in abatement. These considerations lead us, quite satisfactorily to our own mind, to the conclusion, that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party.”<sup>1</sup>

§ 179. Where an action is strictly a personal one and the plaintiffs are bound to join in it, as in an action of trespass, *quere clausam fregit*, brought by tenants in common, a release by two or more of the plaintiffs will be a bar to the action.<sup>2</sup>

<sup>1</sup> Kings v. Hoare, 18 M. & W. 494; Wheeler v. Curtis, 11 Wend. 663; Broome v. Wooton, Yelv. 67; Brinsmead v. Harrison, L. R. C. P. 584; True v. Huntoon, 54 N. H. 121; People v. Keyser, 28 N. Y. 228; Hall

<sup>2</sup> Austin v. Hall, 13 Johnson, 236; v. Gray, 54 Me. 231; Grossman v. Decker v. Livingston, 15 Johns. 482; Lauber, 29 Ind. 622, Stapleton v. Wisheart v. Legro, 33 N. H. 182; King, 33 Ia. 35; Smith v. Wiley, 23 Bradley v. Boynton, 22 Me. 290; Ala. 403.

§ 180. A judgment for the defendant in replevin is conclusive of a right to recover on the bond; but the replevying party or the sureties may prove title to the property, in mitigation of damages,—as, *e. g.*, that he held a chattel mortgage on it which antedated the levy on which the suit was based.<sup>1</sup> A surety on a replevin bond is not estopped by recitals therein to show how much of the property mentioned in the writ was actually replevied, when the officer's return is indefinite in this particular; nor is he estopped by the return of the officer, unless it is definite, distinct and certain.<sup>2</sup>

§ 180A. A sheriff's return to a writ of *fi. fa.*: "And I have, therefore, by virtue of the same written writ, levied upon all the right, title, interest, and claim of the S. & M. Railroad Company, of, in, and to the S. & M. Railroad, in Somerset county, and State of Pennsylvania, and upon all the property, real, personal and mixed, including locomotives, cars, . . . now in the regular use of the said S. & M. Railroad Company, in the conducting of its business as a carrier,"—imports a seizure of the locomotive and cars, and in an action of trespass against the sheriff, is conclusive evidence against him of such seizure.<sup>3</sup>

A sheriff's return is of such authority that it cannot be contradicted;<sup>4</sup> so a sheriff's recognizance is a record and cannot be

<sup>1</sup> Henry v. Quackenbush, 48 Mich. 415; Rankin v. Kinsey, 7 Ill. App. 215.

<sup>2</sup> Miller v. Moses, 56 Me. 129.

<sup>3</sup> Hardesty v. Pyle, 15 Fed. Rep. 778.

<sup>4</sup> Rice v. Groff, 58 Pa. St. 116; Tillman v. Davis, 28 Ga. 494; Davant v. Carleton, 57 Ga. 489; Smith v. Emerson, 43 Pa. St. 456; Brown v. Way, 28 Pa. St. 531; Sindall v. Thacker, 56 Ga. 51; Woodgate v. Knatchdull, 2 T. R. 148; Clerk v. Withers, 6 Mod. 296; Field v. Smith, 2 M. & W. 388; Flud v. Pennington, 2 Cro. Eliz. 872; Harrington v. Taylor, 15 East, 378; Whitrong v. Blaney, 2 Mod. 11; Jackson v. Hill, 10 A. & E. 77; Johnson

v. Bartlett, 81 Ind. 406; Splahn v. Gillespie, 45 Ind. 397; State v. Davis, 73 Ind. 359; Hume v. Conduitt, 76 Ind. 598; Hite v. Fisher, 76 Ind. 231; Hare v. Bedell, 1 Pennypacker, 392; O'Hara v. Baum, 1 Pennypacker, 430; Railway Co. *in re*, 40 Ark. 141; Edwards v. Tipton, 77 N. C. 222; Thompson v. Hammond, 1 Edw. Ch. 497; Paxson's Appeal, 49 Pa. St. 195; Anthony v. Bartholow, 69 Mo. 186; Boque's Appeal, 83 Pa. St. 101; Diller v. Roberts, 13 S. & R. 64; McClelland v. Slingbiff, 7 W. & S. 135; Mentz v. Ilamman, 5 Whart. 153; Stein's Appeal, 83 Pa. St. 101; Newburger's Appeal, 83 Pa. St. 101; Flick v. Troxell, 7 W. & S. 67; Butler v. State, 20 Ind. 169.

impeached or contradicted by parol evidence other than that which is available against judgments and decrees of courts of record, such as false personation;<sup>1</sup> but vagueness and want of precision furnish an exception to the rule.<sup>2</sup> So a suit in equity will not lie to set aside a judgment founded on a regular return of service, upon the allegation that the process was not in truth served. This is impeaching the return collaterally.<sup>3</sup> An officer intrusted by law with the performance of a public duty, of which a record has been made, cannot impeach it.<sup>4</sup> Parol evidence is inadmissible to contradict an officer's return except in a suit against him for a false return;<sup>5</sup> and a defendant who is a privy to a judgment, is equally bound; principals and sureties are concluded by it, and a question that was involved and might have been decided in a suit, cannot be re-opened in an action against a defendant who was privy in law to the original judgment; so if separate suits be brought for the same cause of action against co-obligors, where one is principal and the other is surety, and the principal is discharged on a trial of a plea to the merits, which would inure to both if sued jointly, such judgment is not an estoppel against the plaintiff, if pleaded by the surety in bar of the action against him, for the reason that strangers are not bound by an estoppel, nor can they take advantage of it.<sup>6</sup>

When the contract into which the principal and surety have entered, is purely joint in its origin, or is rendered so by the form in which action has been brought upon it, a judgment for or against the former, will, of course, be a complete bar to any future proceedings against the latter, as a consequence of the general rule of law, and apart from the particular relations existing between them.<sup>7</sup>

<sup>1</sup> Nucken v. Commonwealth, 58 Pa. St. 203; Newton v. Bank, 14 Ark. 9; Dolles v. Bowen, 45 N. H. 124; McGough v. Wellington, 6 Allen, 505.

<sup>2</sup> Boom Co. v. Finney, 58 Pa. St. 200.

<sup>3</sup> Johnson v. Jones, 2 Neb. 126; Edwards v. Tipton, 77 N. C. 222.

<sup>4</sup> Nucken v. Commonwealth, 58 Pa. St. 203; Kuhlman v. Oiser, 5 Duer, 202.

<sup>5</sup> Boom Co. v. Finney, 58 Pa. St. 209; Miller v. Moses, 56 Me. 129; Hinkley v. Ruchman, 5 Cal. 53; Bean v. Parker, 17 Mass. 591; Whittaker v. Sumner, 7 Pick. 551; Reeves v. Reeves, 33 Miss. 28.

<sup>6</sup> Bank v. Robinson, 13 Ark. 214; McClelland v. Ridgway, 12 Ala. 482; Morris v. Lucas, 8 Blackf. 9; Stingley v. Kirkpatrick, 8 Blackf. 186.

<sup>7</sup> Pence v. Athey, 4 W. Va. 22; Crow v. Bowby, 68 Ill. 23; Bartlet

§ 181. A judgment involving the title of the original vendor to a thing sold, is conclusive upon him, if the notice was given him of the pendency of the action and its nature, and it makes no difference that the action is not against his vendor, but against a subsequent vendee, who in turn has sold the property.<sup>1</sup> or that at the trial disclaim title.<sup>2</sup> So one who sells chattels with warranty of title, and who, when his vendee is sued for the value by the real owner, takes upon himself the defence of the suit, is bound by the result, whatever may have been the form of the action.<sup>3</sup> So subsequent attaching creditors and assignees of the defendant upon the record, having been admitted to plead in his name, may plead a former judgment by the plaintiff, where the former defendant could have pleaded it as a defence.<sup>4</sup> Any creditor, who defends an attachment, on the ground that the debt attached is due to him, is precluded, if he fail in his defence, from contesting the validity of the attachment as against the plaintiff, or as against the garnishee. So an action by a sheriff upon the bond given by the deputy sheriff, on receiving his appointment, to indemnify the sheriff against his acts or omissions as such deputy. The surety in such bond is estopped by a verdict against the sheriff in an action brought against him for the neglect of the deputy, of which action the deputy *had notice* and which he defended, although no notice of the action was given to the surety. This is on the principle that the surety is necessarily a privy at law, as his bond was for the purpose of indemnifying the sheriff against just such acts and omissions, and made himself privy to any action which might arise.<sup>5</sup> The court thus reasons: "The defendants being jointly bound to indemnify the plaintiff, they were in privy of contract with

v. Campbell, 1 Wend. 50; Fay v. Ames, 44 Barb. 327; Evans v Commonwealth, 8 Watts, 398; Eagles v. Kern, 5 Whart. 144; Shively v. United States, 5 Watts, 332; Marshall v. Aiken, 25 Vt. 328.

<sup>1</sup> Thurston v. Spratt, 52 Me. 202; Gist v. Davis, 2 Hill Ch. 335; Bender v. Fromberger, 4 Dall. 426; Hamilton v. Cutts, 5 Mass. 340.

<sup>2</sup> Boney v. Dewey, 13 Johns. 224.

<sup>3</sup> Jennings v. Sheldon, 44 Mich. 92.

<sup>4</sup> Child v. Eureka Works, 45 N. H. 517; Moore v. Speckman, 12 S. & R. 287; Richards v. Watson, 23 Mo. 34; Tarleton v. Johnson, 25 Ala. 300; Wallace v. Berry, 51 Vt. 602.

<sup>5</sup> Fay v. Ames, 44 Barb. 235; Stephens v. Shafer, 48 Wis. 54; S. C., 63 Am. R. 793.

each other, and are to be regarded and treated, *quoad* the contract, and the rights and liabilities connected with and growing out of it, as one person. In such a case, *notice to one is notice to all*, on the same principle as where two or more persons are shown to be jointly bound by a contract, the acts and admissions of either are binding upon all the others to the same extent as upon the one doing the acts or making the admissions.

“It was no part of plaintiff’s agreement with the sureties on the bond, that they should have notice of suits brought against him for the misconduct of his deputy; and their liability as indemnitors was not made to depend on such notice. The law indeed required notice to the deputy, in order that he might defend, and discharge himself from the misconduct imputed to him, and for the purpose of rendering the judgment against the sheriff conclusive, if one should be obtained. The notice was properly given to the deputy, whose conduct, only, was called in question, and who is presumed to know the facts and circumstances far better than the sureties or the sheriff. If, in addition to giving notice to the deputy, notice had been given to the sureties also, it would have been little more than an idle and useless ceremony, as it is to be presumed that all they would or could have done, would have been to refer the matter to their principal, the deputy, and cast on him the burthen of the defense, as the sheriff has done.

“By a fair and reasonable interpretation of the conditions of the bond, the parties contemplated that actions might be brought against the sheriff for the acts or omissions of his deputy, and the covenant of indemnity in the condition was inserted to provide for such contingencies.”

So a decree awarding money paid into court to one of several contesting execution creditors, is, if unreversed and unappealed from, conclusive that the party to whom it is awarded is, and that the contestants are not entitled thereto, and all matters litigated therein can not be examined in a collateral action, such as an action brought by the sheriff on a bond of indemnity taken from one of the contestants.<sup>1</sup> So a railroad company which has been notified of the pendency of an action for an injury occasioned at a railway crossing, and requested to defend the action,

<sup>1</sup> Noble v. Copes Adm., 50 Pa. St. 17.

is bound by the judgment, and it is conclusive against them, as to the cause of the injury and extent of the damage, whether they appear in the case or not.<sup>1</sup> So in a *scire facias* upon a sheriff's official recognizance, the previous judgment of the claimant is conclusive of the claimant's right of a judgment against the sheriff and his sureties, as against all the defenses that the sheriff might urge as against him alone, except when it is a judgment against the sheriff by default.<sup>2</sup> So a verdict and judgment against a city in an action for personal injuries occasioned by a defect within the limits of a highway, are conclusive evidence in a subsequent action by the city against the tenant of the land, who had notice of the pendency of the suit, and of the city's intention to hold him responsible for all damages recovered therein, and had an opportunity to furnish evidence, and testified at the time of trial, although he was not requested to, and did not take upon him-self the defense of that action, that the highway was defective, that the person was injured there, while using due care, and of the amount of the injury; but not of the tenant's liability to keep the place in repair, nor of his having neglected to do so, nor of such negligence having been the sole cause of such injury.<sup>3</sup> But such person is not concluded by such judgment, unless he had notice of and an opportunity to defend that action.

§ 182. Every person is entitled to his day in court, before his rights can be concluded by its judgment. It is a principle that lies at the foundation of all jurisprudence in civilized countries, that a person must have an opportunity of being heard, before a court can deprive such person of his rights. To proceed upon any other rule, would shock the sense of justice entertained by mankind, would work great wrong and injustice, and render the administration of justice a mere form. Until a person is made

<sup>1</sup> Veazie v. R. R., 49 Me. 119, Andrews v. Davidson, 17 N. H. 413; Colburn v. Pomeroy, 44 N. H. 19.

<sup>2</sup> Bradley v. Chamberlain, 35 Vt. 277; Chamberlain v. Godfrey, 36 Vt. 380.

<sup>3</sup> Boston v. Worthington, 10 Gray,

496; Portland v. Richardson, 51 Me. 46; Canal Co. v. County, 57 Md. 201; S. C., 40 Am. R. 430; Catterlin v. Frankfort, 79 Ind. 517; S. C., 41 Am. R. 627; McNaughton v. Elkhart, 83 Ind. 384; Milford v. Holbrook, 9 Allen, 17; Chicago v. Robbins, 2 Black, 418.

a party to a suit, and is afforded a reasonable opportunity of being heard in defense of his rights, a court has no power to divest him of a vested right. This is coeval with the common law, and lies at the very foundation of our jurisprudence, whether chancery, common law, or statutory, and applies equally to superior as well as inferior jurisdictions. Those only, who, in some manner recognized by the forms of law, become parties or privies to the record in a suit, can be concluded by the judgment therein.<sup>1</sup> Parties, in the legal sense, are all persons having a right to control the proceedings, to defend, to adduce, and cross-examine witnesses, and to appeal from the decision.<sup>2</sup> if any appeal lies. On this principle, the lessor of the plaintiff in ejectment, and the tenant, are the real parties to the suit, and are concluded in any future action in their own names, by the judgment in that suit.<sup>3</sup> So, if there be a trial between A.'s lessee and B., who recovers judgment, and afterwards in another trial of title to the same lands, between B.'s lessee and A., the former verdict and judgment will be admissible in evidence in favor of B.'s lessee, against A.; for the real parties in both cases were A. and B. The case of *privies*, previously mentioned, is governed by like principles to those which have been stated in regard to parties; the general rule is, that the person who represents another, and the person who is represented, have a legal identity; and whatever binds the one, in relation to the subject of their common interest, binds the other also. Thus, a verdict and judgment, for or against the ancestor, binds the heir.<sup>4</sup> So, if several successive remainders are limited in the same deed, a judgment for one remainder-man is evidence for the next in succession.<sup>5</sup> But a judgment, to which a tenant for life was a party, is not evidence for

<sup>1</sup> *Adams v. Filer*, 7 Wis. 306.

<sup>2</sup> *Carney v. Emmons*, 9 Wis. 114.

<sup>3</sup> *Doe v. Huddart*, 2 C. M. & R. 316; *Doe v. Price*, Tyrw. 410; *Aslin v. Parkin*, 2 Burr. 665; *Wright v. Jatham*, 1 A. & E. 3; *Dewey v. Osborn*, 4 Cow. 339; *Graves v. Joice*, 5 Cow. 261; *Jackson v. Loomis*, 4 Cow. 168; *Arnick v. Oyler*, 25 Pa. St. 506; *Van Allen v. Rogers*, 1 John. Cas. 233; *Barley v. Fairplay*, 6 Binn. 450; *Good-*

*title v. Toombs*, 3 Wils. 118; *Benson v. Matsdorf*, 2 Johns. 369; *Jackson v. Randall*, 11 Johns. 405; *Jackson v. Stone*, 13 Johns. 447.

<sup>4</sup> *Calhoun v. Dunning*, 4 Dall. 120; *Kinnersly v. Orpe*, 2 Doug. 517.

<sup>5</sup> *Fraser v. Council*, 19 S. C. 384; *Shannon v. Taylor*, 16 Tex. 413; *Meeks v. Vassant*, 3 Sawyer, 206; *Locke v. Norborne*, 3 Mod. 142.

<sup>6</sup> *Pyke v. Crouch*, 1 Ld. Raym 780.

or against the reversioner, unless he came into the suit upon *aid prout*.<sup>1</sup> A judgment in trespass against one who justifies as the servant of A., is evidence against another defendant in another action, it appearing that he also acted by the command of A., who was considered the real party in both cases.<sup>2</sup>

§ 183. An assignee is bound by a judgment against the assignor prior to the assignment.<sup>3</sup> Where the assignor of a note is a party to a suit by the assignee against the maker, he is bound by the judgment, in a suit by the assignee against him for the amount paid as a consideration for the assignment.<sup>4</sup> There is the like privity between the ancestor and all claiming under him, not only as heir, but as tenant in dower, tenant by the curtesy, lessee, devisee, etc.<sup>5</sup> A judgment of ouster, in *quo warranto*, against the incumbent of an office, is conclusive evidence against those who derive their title to office under him. The advantage of the *quo warranto* as a means of trying the right to an office, is that as the people are the complainants, the judgment therein binds all the parties interested.<sup>6</sup> Where one sued for diverting water from his works, and had judgment, and afterwards he and another sued the same defendants for a similar injury, the former judgment was held admissible in evidence for the plaintiffs, being *prima facie* evidence of their privity in estate with the plaintiff in the former action.<sup>7</sup> The same rule applies to all grantees, they being in like manner bound by a judgment concerning the same land, recovered by or against their grantor, prior to the conveyance.<sup>8</sup> The estoppel of judgment on a verdict applies in the case of title to realty only to those portions of the realty whereof the title was formally put in issue.<sup>9</sup>

§ 184. According to the ancient doctrine "*Si ego cum vicino aquae pluviae ascendae, deinde alteruter nostrum praeidium*

<sup>1</sup> 1 Buller Nisi Prius, 232.

<sup>2</sup> Kinnersly v. Orpe, 2 Doug. 517.

<sup>3</sup> Tompkins v. Hyatt, 28 N. Y. 347;  
Johnson v. Thaxter, 7 Griv., 242,  
Adams v. Barnes, 17 Mass., 365.

<sup>4</sup> Elliot v. Threlkeld, 16 B. Mon.  
841.

<sup>5</sup> Outram v. Morewood, 3 East, 190.

353; Locke v. Norborne, 3 Mod. 192.

<sup>6</sup> Hart v. Harvey, 32 Barb. N. Y.  
55.

<sup>7</sup> Blakenore v. Canal Co., 2 C. M.  
& R. 133.

<sup>8</sup> Foster v. Derby, 1 A. & E. 787.

<sup>9</sup> Providence v. Adams, 11 R. I.

*vendiderit, et emptor agat, vel cum eo agatur, naec exceptio nocet; sed de eo opere, quod jam erat factum, cum judicium acciperetur;*" there can be no question but what a purchaser had the same right as the seller to the benefits of the *exceptio rei judicatae* who would be bound to defend any action against him and to save him harmless from the consequences of it. Although this principle is not generally applicable to purchasers without warranty, they are nevertheless to be considered as the same party with the persons to whom they have succeeded in the property in question, and have the same benefit of the judgment. Judgments on questions of title to lands are as conclusive on privies, that is, on all who claim by descent or purchase through or under the person for or against whom they are rendered, as they are on the parties to the action.<sup>1</sup> The same principle applies to chattels, for the reason that the title to chattels in the vendee depends on the title of the vendor, and whatever will operate as an estoppel against the vendor operates with the same effect against the vendee.<sup>2</sup> So where in an ejectment suit to try the title of land, the proceedings terminated in favor of the plaintiff, and after the decision the defendant conveyed the property, and his grantee afterwards obtained possession of the land, in an action for ejectment against the latter's grantee he was estopped

<sup>1</sup> Wood v. Jackson, 3 Wend. 27; Adams v. Barnes, 17 Mass. 365; Estep v. Hutchman, 14 S. & R. 435; Peay v. Duncan, 20 Ark. 85; Williams v. Le Blanc, 14 La. Ann. 757; Wilson v. Davol, 5 Bosw. 619; Lee v. Kingsbury, 13 Tex. 68; Clink v. Thurston, 47 Cal. 21; Yates v. Yates, 81 N. C. 397; Timon v. Whitehead, 58 Tex. 290; Welton v. Cook, 61 Cal. 481; Johnson v. Lovelace, 61 Ga. 62; Russell v. Farquhar, 55 Tex. 355; Montgomery v. Samory, 99 U. S. 482; Dunham v. Wilfong, 69 Mo. 355; Sigmond v. Hawn, 86 N. C. 310; Stoutimore v. Clark, 70 Mo. 471; Sewell v. Watson, 31 La. Ann. 589; Cooper v. Platt, 45 N. Y. Super. Ct. 243; Compton v. Sandford, 30 La. Ann. 888;

Devin v. Ottumwa, 53 Iowa, 461; Goodenow v. Litchfield, 59 Iowa, 226; Parker v. Legg, 13 Rich. L. 171; Coal Co. v. Cobb, 82 Ill. 183; Connolly v. Connolly, 26 Minn. 350; Hudson v. Smith, 39 N. Y. Superior Ct. 52; Warner v. Trow, 5 Thomp. & C. 130; Mayo v. Foley, 40 Cal. 281; Morgan v. Barker, 26 Vt. 602; McCravey v. Remsen, 19 Ala. 430; Boynton v. Willard, 10 Pick. 166; Thompson v. Thompson, 81 Ala. 108; Cunningham v. Harris, 5 Cal. 81; Cammell v. Sewel, 3 H. & N. 617; Marsh v. Pier, 4 Rawle. 273; Bank v. McKee, 2 Pa. St. 318; Finney v. Boyd, 26 Wis. 370; Campbell v. Cross, 39 Ind. 155.

<sup>2</sup> Mitchell v. Peace, 7 Cush. 359; Parker v. Leggett, 13 Rich. L. 171; Coal Co. v. Cobb, 82 Ill. 183.

from denying the plaintiff's title because of the former suit by his grantor.<sup>1</sup> In trespass *quare clausum fregit*, where the question of title is directly involved and adjudicated, and a judgment rendered by a court having competent jurisdiction, it will conclude the parties and operate as an estoppel, if it appears on the face of the record, or as conclusive evidence in relation to title in any subsequent litigation of that matter between them.<sup>2</sup> So where a grantor, by warranting title, places himself in the position of a guarantor, a judgment in ejectment against him will be *prima facie* evidence in an action of covenant against the grantor.

§ 185. A judgment or decree in an action to foreclose a mortgage lien upon land binds all the estate in the land which was held by the parties defendants to the action at the commencement of the action, or which they or any of them may sell to a third person, *pendente lite*, with notice of the action, and they are estopped from questioning it unless it was taken by fraud or collusion of any defendants to whose interests in the mortgage premises the subsequent purchaser had succeeded.<sup>3</sup> The general rule is that a foreclosure of a mortgage is conclusive between parties and priors,<sup>4</sup> and where railroad contractors are made parties to a bill of foreclosure and allow a decree to be taken against them *pro confesso* they are bound by the decree.<sup>5</sup>

§ 186. Ordinarily the judgment of a court of competent jurisdiction is conclusive between parties to it. One who is neither a party or privy or purchases *pendente lite*, is not bound, but

<sup>1</sup> Scheetz v. Fitzwater, 5 Pa. St. 126; Myron v. Proprietors, 5 Met. 15; Sawyer v. Kendall, 10 Cush. 241; Williams v. Dongan, 20 Mo. 186; St. Louis v. Gorman, 29 Mo. 59; Shaw v. Nicholay, 30 Mo. 99; Holton v. Whitney, 30 Vt. 405; McNealy v. Langan, 22 Ohio St. 32; Nelson v. Trigg, 4 Lea. 705; Whitford v. Crooks, Mich. 1884, 3 C. 30 A. L. J. 452.

<sup>2</sup> Pitkuis v. Leavitt, 13 Vt. 379; Paul v. Witman, 3 W. & S. 407.

<sup>3</sup> Small v. Leonard, 26 Vt. 209.

<sup>4</sup> Amador Co. v. Mitchell, 59 Cal.

168.

<sup>5</sup> Groesbeck v. Ferguson, 43 Iowa, 532; Witherbee v. Stower, 23 Hun, 27; Spinks v. Glenn, 67 Ga. 744; Markson v. Ide, 29 Kas. 649; Galbreath v. Drought, 29 Kas. 741; Hicks v. Aylsworth, 13 R. I. 592.

<sup>6</sup> Woods v. Ry. Co., 99 Pa. St. 101; Jerome v. McCarter, 94 U. S. 735; Westcott v. Edmonds, 68 Pa. St. 36; Taylor v. Cornelius, 60 Pa. St. 198; Wilhelm's Appeal, 79 Pa. St. 120; Giffard v. Hoit, 1 Sch. & L. 403.

he who purchases or goes into possession during the pendency of the suit is bound by the decree that is made against the person from whom he derives title.<sup>1</sup> The law is that he who intermeddles with property in litigation does it at his peril, and is as con-

- <sup>1</sup> *Finney v. Boyd*, 26 Wis. 366; *Hill v. Oliphant*, 41 Pa. St. 361; *Woodins v. Clemens*, 32 Ia. 280; *French v. Shotwell*, 5 Johns. Ch. 545; *Craid v. Ward*, 36 Barb. 377; *Walters v. Riehl*, 38 Md. 210; *Warner v. Trow*, 38 Wis. 195; *Tilton v. Cofield*, 93 U. S. 163; *Corcoran v. Chesapeake, &c. Co.*, 94 U. S. 741; *Kerrison v. Stewart*, 93 U. S. 155; *Fogarty v. Sparks*, 22 Cal. 142; *Sampson v. Ohleyer*, 23 Cal. 200; *Bauk v. Sprague*, 21 N. J. Eq. 530; *Merritt v. Egan*, 59 Ill. 212; *Walden v. Bodley's Heirs*, 9 How. 34; *Haynes v. Calderwood*, 23 Cal. 409; *Foster v. Wells*, 4 Tex. 101; *Bauk v. Andrews*, 12 Heisk. 306; *Berry v. Whittaker*, 58 Me. 422; *Crooker v. Crooker*, 57 Me. 395; *Commonwealth v. Dieffenbach*, 3 Grant Cas. 368; *Society v. Hartland*, 2 Paine C. C. 536; *Hart v. Marshall*, 4 Minn. 294; *Cooley v. Brayton*, 16 Iowa, 10; *Welton v. Cook*, 61 Cal. 481; *Savage v. Sherman*, 24 Hun, 307; *Amador Co. v. Mitchell*, 59 Cal. 168; *Hershey v. Torbett*, 27 Pa. St. 18; *Hall v. Jack*, 32 Md. 253; *Youngman v. R. R. Co.*, 65 Pa. St. 278; *Barelli v. Delassus*, 16 La. Ann. 280; *Masson v. Saloy*, 12 La. Ann. 776; *Horn v. Jones*, 28 Cal. 194; *Caldewood v. Lewis*, 23 Cal. 335; *Hurlbut v. Bultenop*, 27 Cal. 50; *Montgomery v. Byers*, 21 Cal. 194; *Truett v. Truett*, 38 Ind. 16; *Hughes v. Whittaker*, 4 Heisk. 299; *Boulden v. Lannahan*, 29 Md. 200; *Sheridan v. Andrews*, 49 N. Y. 478; *Porter v. Barclay*, 18 Ohio S. 546; *Borrowscale v. Tuttle*, 5 Allen, 397; *Turner v. Babb*, 60 Mo. 342; *Pindall v. Trevor*, 30 Ark. 249; *Martin v. Sikes*, 1 Cas. in Ch. 150; *Culpepper v. Austin*, 2 Ch. Cas. 115; *Garth v. Ward*, 2 Atk. 174; *Sorrell v. Carpenter*, 2 P. Wms. 483; *Anon.*, 1 Vern. 318; *Finch v. Newnham*, 2 Vern. 316; *Walker v. Smallwood*, Amb. 676; *Bishop, &c. v. Paine*, 11 Ves. 194; *Bellamy v. Sabine*, 7 De G. & J. 566; *Sercomb v. Steele*, 20 How. 94; *Norton v. Birge*, 35 Conn. 250; *Lee v. Salinas*, 15 Tex. 495; *Meux v. Anthony*, 11 Ark. 411; *Shotwell v. Lawson*, 30 Miss. 27; *Copenhagen v. Huffaker*, 6 B. Mon. 18; *Jackson v. Warten*, 32 Ill. 231; *Loomis v. Riley*, 24 Ill. 307; *Inloe v. Harvey*, 11 Md. 519; *Sharp v. Lunley*, 34 Cal. 611; *Murray v. Ballou*, 1 John. Ch. 566; *Kimberling v. Hartley*, 1 McCrary, 136; *Moore v. Hershey*, 90 Pa. St. 196; *Kunz v. Buchman*, 61 How. Pr. 519; *Gould v. Hendrickson*, 93 Ill. 513; *Smith v. Coker*, 65 Ga. 461; *Edwards v. Norton*, 55 Tex. 405; *McIlmath v. Hollander*, 73 Mo. 105; *S. C.*, 39 Am. R. 484; *Rollins v. Henry*, 78 N. C. 342; *Drake v. Crowell*, 40 N. J. L. 58; *Rider v. Kelso*, 53 Iowa, 367; *Montgomery v. Birge*, 31 Ark. 149; *Allen v. Poole*, 54 Miss. 323; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Smith v. Ford*, 48 Wis. 115; *Treadway v. McDonald*, 51 Iowa, 663; *Jones v. McNarrin*, 68 Me. 334; *Blanchard v. Ware*, 43 Iowa, 530; *Badger v. Daniel*, 77 N. C. 251; *Harmon v. Byram*, 11 W. Va. 511; *Hanson v. Armstrong*, 23 Ill. 442; *Jones v. Chiles*, 2 Dana, 25; *Howard v. Kennedy*, 4 Ala. 592; *Smith v. Traube*, 1 McLean, 87; *Wallin v. Huff*, 3 Sneed, 82; *Jackson v. Tuttle*, 9 Cow

clusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset<sup>1</sup>

§ 187. If the party himself who is the victim of fraud or usury chooses to waive his remedy and release the party, it does not belong to a subsequent purchaser under him to recede and assume the remedy for him. If a judgment was fraudulent by collusion between the parties to it, on purpose to defraud a subsequent purchaser, the case would present a very distinct question. But if the judgment was fraudulent only as between the parties, it is for the injured party alone to apply the remedy. If he chooses to waive it and discharge the party, it can not consist in justice or sound policy that a subsequent purchaser, knowing of that judgment, should be competent to investigate the merits of the original transaction as between the original parties. *Quis que potest renunciare jure pro se introducto*. Fends and litigation would be interminable if any distinct purchaser of distinct parcels of land, affected by a judgment existing and known when they became interested, could overhaul the judgment upon an allegation of usury, extortion or fraud practiced upon their principal, the vendor, when he himself chooses to acquiesce in the alleged injury or has expressly waived all complaint. A fraud can only be avoided by him who had a prior interest in the estate affected by the fraud, and not by him who, subsequently to the fraud, acquired an interest in the estate.<sup>2</sup> Can it be possible that a stranger to the judgment and a voluntary purchaser under it, and with knowledge of the subsequent suit, can be permitted to compel the defendant to discuss the merits of that judgment over again with him, to have his right and interest twice tried and twice jeopardized on a charge of fraud? It would be an anomaly in our jurisprudence for such a subsequent purchaser to be enabled to revive the litigation. He is precluded as being a volunteer under a judgment between other persons. He is emphatically precluded from coming into a court of equity

233; Peery v. Cabanis, 70 Ala. 253; Weyh v. Boylan, 62 How. Pr. 397; Plumer v. Bood Co., 49 Wis. 449. See Herman on Executions, p. 494; Herman on Real Estate Mortgages, Vol. 2, Chap. 12.

<sup>1</sup> Inloe v. Harvey, 11 Md. 519; Salisbury v. Denton, 7 Lans. 352; Harrington v. Slade, 19 Barb. 162; Tilton v. Cofield, 93 U. S. 168.

<sup>2</sup> Upton v. Bassett, Cro. Eliz. 445.

after those persons under whom he claims have litigated the validity of the judgment, and consented upon fair terms to a decree, waiving all objections to the judgment and recognizing its obligation. The judgment precludes, on general principles, for the purchaser voluntarily comes in under the judgment *pro bono et malo*, and except in the special case, in which the judgment was confessed collusively and by a corrupt agreement to defraud some subsequent purchaser, he must take the lien as he finds it, and has no business to interfere with the contracts of other people. The decree affirming the judgment precludes him also, because it gives the judgment the additional force of a *res adjudicata* between the parties to the judgment, after they had raised questions on the judgment themselves. An attempt of this kind, if successful, would be unprecedented and contrary to the most obvious principles of public policy. It would contravene that sound maxim of the common law, that *expedit reipublicæ ut sit finis litium*.<sup>1</sup> In order to constitute a *litis pendentia* there must be a continuance of *litis contestatio*, and something must be done to keep it alive and in activity.

§ 187A. "The doctrine of *lis pendens* is this, that real property, or, to some extent, personal property, when it has been put in litigation by a suit in equity, in which it is specifically described, will, if the suit is prosecuted with diligence, be bound by the final decree, notwithstanding any intermediate alienation. The doctrine, as stated, does not reach a case where a party is seeking to recover, not any specified property, but the simple value of certain property. The doctrine is founded on the policy that property which is specifically sued for shall abide the result of the suit, for otherwise, by successive alienations, the litigation might be indefinitely prolonged.<sup>2</sup> The doctrine relates only to changes of ownership, but assumes that the property itself will remain either identically the same, or be at least specifically traceable into some new form in which it can be reached. The doctrine is not a favorite of the courts, and will not be extended without strict necessity."<sup>3</sup>

<sup>1</sup> French v. Shotwell, 5 Johns. Ch. 555; Stoutimore v. Clark, 70 Mo. 471.

<sup>2</sup> Bellamy v. Sabine, 1 De G. & J. 566.

<sup>3</sup> Leitch v. Wells, 48 N. Y. 585

As all people are supposed to be attentive to what passes in a court of justice, and it is to prevent a greater mischief that would arise by people's purchasing a right under litigation and then in contest, that this principle has been established.<sup>1</sup>

A purchase of a right which is undergoing a judicial investigation is a fraud upon the plaintiff, and is so far considered a nullity that it cannot avail against his title.<sup>2</sup>

§ 188. A suit duly prosecuted in good faith, and followed by a judgment or decree, is constructive notice to every person who acquires from a defendant, *pendente lite*, an interest in the subject matter of the litigation, of the legal and equitable rights of the plaintiff, as charged in the bill or complaint, and established by the judgment or decree. This effect of a successful litigation in subordinating the title of a purchaser pending a litigation, to the rights of a plaintiff, as established in the suit, is not derived from legislation. It is a doctrine of courts of ancient origin, and rests not upon the principles of the court, with regard to notice, but on the ground that it is necessary to the administration of justice that the decision of the court in a suit should be binding, not only on the litigant parties, but also upon those who acquire title from them during the pendency of the suit. Such a purchaser need not be made a party, and will be bound by the decree which shall be made. Although the maxim is "*pendente lite nil innovetur*," the maxim is not to be understood as warranting the conclusion that the conveyance so made is absolutely null and void at all times and for all purposes. The true interpretation of the maxim is, that the conveyance does not vary the rights of the parties in that suit; and they are not bound to take notice of the title acquired under it, but with regard to them the title is to be taken as if it had never existed; but, in order to make *lis pendens* notice, it is necessary that there should be a close and constructive prosecution of the *lis pendens*, the protec-

Gardner v. Peckham, 13 R. I. 102; 18; Bellamy v. Sabine, 1 De G. & J. 566; White v. Perry, 14 W. Va. 60.  
Miles v. Leff, 60 Iowa, 168; Dovey's Appeal, 97 Pa. St. 153; Murray v. 1 Worsley v. Scarborough, 3 Atk. 392.  
Lylburn, 2 Johns Ch. 444; Warren v. 2 Murray v. Lylburn, 2 Johns. Ch. 441.  
Marcy, 97 U. S. 96; Kiefler v. Ehler, 18 Pa. St. 388; Stone v. Elliott, 11 Ohio St. 252; Mims v. West, 38 Ga.

tion may be lost before the termination of the action, by negligence in its prosecution.<sup>1</sup>

A purchaser *pendente lite* will hold in subservience to the rights of the parties as finally determined in the pending litigation.<sup>2</sup>

A plaintiff is not compelled to bring in any party who has succeeded to the rights of the defendant *pendente lite*. In case of death, marriage, or other disability, he may continue the suit by motion against the personal representative or successor in interest; but in other cases the action continues in the name of the original party, and the other is bound by the judgment if a privy, or the court may allow such new person in interest to be substituted.<sup>3</sup> So in an action upon a tax deed a judgment for the plaintiff binds a subsequent grantee of the defendant, so that he cannot in ejectment set up a title in a third party paramount both to that of the plaintiff and to that of his grantor.<sup>4</sup>

This principle applies with equal force to real or personal property. The only exception to this rule is that made to negotiable paper prior to its maturity. If such paper is past due and in the possession of the payee, it is held to be affected with the notice which every one is bound to take of an action pending against the owner of real or personal property, if it can be placed under the control of the court.<sup>5</sup> The reason of the rule in its application to real is equally imperative in its application to personal property. Personal property can be disposed of with greater facility than real, but there is no reasonable ground upon which to base a rule exempting personalty from the application of the doctrine of *lis pendens*, provided there is good faith and due diligence used in the prosecution of the action to final judgment. The facility with which personalty can be disposed of,

<sup>1</sup> Herman on Executions, p. 494.

<sup>3</sup> Voorhees v. Seymour, 26 Barb.

<sup>2</sup> Alwood v. Mansfield, 59 Ill. 496;  
Hoole v. Atty. Genl., 23 Ala. 190;  
Green v. White, 7 Blackf. 242;  
Knowles v. Rabein, 20 Iowa, 101;  
Blanchard v. Ware, 37 Iowa, 305;  
Bayer v. Cockrill, 3 Kas. 282; Montgomery v. Birge, 31 Ark. 149; Horn v. Jones, 28 Cal. 194; Truitt v. Truitt, 38 Ind. 16; Sharp v. Lumley, 54 Cal. 611.

N. Y. 569.

<sup>4</sup> Finney v. Boyd, 26 Wis. 366.

<sup>5</sup> Murray v. Ballow, 1 Johns. Ch. 566; Tabb v. Williams, 4 Jones Eq. 552; McCutchen v. Miller, 31 Miss. 65; Tyler v. Hyde, 2 Blatchf. C. C. 308; Leitch v. Wells, 48 Barb. 637; Scudder v. Van Amberg, 4 Ed. Eq. 29; Diamond v. Lawrence, 37 Pa. 353.

thus enabling a debtor to defeat the payment of his just obligations and render a judgment practically worthless, presents the strongest reason for the necessity of its application to all classes of property except negotiable paper prior to its maturity.<sup>1</sup>

§ 189. Without going into a complete examination of this doctrine and the conflicting decisions in regard to its application, it will be sufficient for our purpose to state the general doctrines. First. *Lis pendens* commences, except where the statute regulates the time, when the summons is served, or where the process issues from a court of record, when the complaint or bill is filed, in good faith, with intent to have process issued and served upon the defendant,<sup>2</sup> or from the time it is served in accordance with the statutory mode of service, either constructive or personal.<sup>3</sup> Second. The action must be for some certain and specific thing, which must be affected by the judgment or decree rendered in the action. Thus, an action for a divorce will not operate as a *lis pendens*, for the reason that the cause is general and does not apply to any certain estate.<sup>4</sup> Third. The property upon which the *lis pendens* is to operate must be so identified in the action as to notify all who may subsequently become interested in the estate that there is an action pending which may or will affect it, and that if they become interested in it they do so at their peril—that is, it must be sufficiently certain to give the means of distinct and intelligible information of the matter to which it relates. Fourth. The suit must be prosecuted to a final determination without unnecessary delay. It must not be commenced and continued from term to term at the will of the parties, and after years of delay then

<sup>1</sup> Mims v. West, 38 Ga. 18; Winston v. Westfield, 22 Ala. 760.

<sup>2</sup> Powell v. Wright, 7 Beav. 444; Houghwout v. Murphy, 22 N. J. Eq. 545; Butler v. Tomlinson, 38 Barb. 611; Allen v. Mandeville, 26 Miss. 397; Edwards v. Banksmith, 35 Ga. 213; Herrington v. Herrington, 27 Mo. 500; Lyle v. Bradford, 7 Mon. 114; Kellogg v. Fancher, 23 Wis. 21; Miller v. Sherry, 2 Wall. 237; Goodwin v. McGeehee, 15 Ala. 232; Wick-

liffe v. Breckenridge, 1 Bush, 443; Leitch v. Wells, 48 N. Y. 585.

<sup>3</sup> Bennett v. Williams, 5 Ohio, 461; Carter v. Miller, 30 Mo. 432; Chandron v. Mugee, 8 Ala. 570; Clevinger v. Hill, 4 Bibb. 498; Hayden v. Buckling, 9 Paige, 511; Miller v. Kershaw, 1 Bailey, 479; Allen v. Case, 13 Wis. 621.

<sup>4</sup> Hamlin v. Beavan, 7 Ohio, 161; Brightman v. Brightman, 1 R. I. 112; Feigley v. Feigley, 7 Mich. 537.

disposed of. Negligence in its prosecution will terminate the protection afforded by the notice.<sup>1</sup>

All who acquire title to real estate from a defendant during the pendency of a bill to establish a right, or for the enforcement of a trust that is distinctly alleged in the bill, are affected with notice and are bound by the decree rendered against the vendor,<sup>2</sup> while a judgment in an action of ejectment is conclusive evidence of title in a subsequent action for *mesne* profits, against all claiming under or through the defendant as purchasers during the litigation, and while the estoppel is limited only to the profits of the land, it does not bind or embrace the title. So a judgment confirming a mechanic's lien is conclusive upon the parties thereto, and those claiming under and in privity with them; and it is not necessary to make a mortgagee or incumbrancer by a lien of a different kind, a party in order to bind them by such a judgment,<sup>3</sup> if their interests are subsequently acquired. But in the distribution of a fund, judgment creditors may attack a judgment collaterally for fraud, on them, but not because it is a fraud on the debtor. A subsequent judgment creditor cannot set aside a judgment merely because it is erroneous. But as between the creditors and a purchaser at a judicial sale under the judgment, there is no privity of contract, and he cannot invoke their equities and claim under them for his exclusive benefit.<sup>4</sup>

In confiscation cases, a judgment operates only during the life-time of the owner; so that the heirs may claim the property after the death of their ancestor without collaterally attacking the judgment of confiscation.<sup>5</sup>

§ 190. A party who has given an indemnifying bond to an officer for the purpose of having a levy made on a writ of attachment or execution, who in action against the officer appears and has control of the defense, or if he has notice to appear and take

<sup>1</sup> Fox v. Reeder, 28 Ohio S. 181; Gossom v. Donaldson, 18 B. Mon. 237; Wickliffe v. Breckenridge, 1 Bush, 443; Kinsman v. Kinsman, 1 R. & M. 617; Preston v. Tubbin, 1 Vern. 286; Bybee v. Sumners, 4 Oreg. 354.

<sup>2</sup> Finney v. Boyd, 26 Wis. 366; Hill v. Oliphant, 41 Pa. St. 364.

<sup>3</sup> State v. Eads, 15 Iowa, 114; Groesbeck v. Ferguson, 43 Iowa, 532.

<sup>4</sup> Bank v. Roseberry, 81 Pa. St. 309

<sup>5</sup> Slidell v. Bank, 27 La. Ann. 354

part in its defense, but does not participate in the conduct of the suit, is concluded by the judgment in any subsequent litigation in regard to same subject matter as effectually as if he were a party to the record; and a party having an interest in a suit who intervenes in the suit, and judgment is rendered against him, it is final, and even equity will not relieve against it: and a recovery of a judgment against a sheriff, by the owner of property attached for the debt of a stranger, the suit being defended by the attaching creditors, is conclusive in another suit between the same parties. A private party is estopped by a suit against a corporation, for an act of negligence, if he knew of the suit, and could have defended it, as an express notice is not required: and while persons not parties are not estopped by a decree, yet, if they wish to derive any benefit from it, are compelled to admit its validity; they are bound by the estoppel, because they cannot accept part and reject part of an entirety.<sup>2</sup> A judgment of foreclosure does not bind the assignee of the mortgagor, unless he was a party to the suit.

§ 191. A judgment in trespass or trover will not *transfer the title* of the goods to the defendant, although it is pleadable in bar of any action afterwards brought by the same plaintiff, or those in privity with him, against the same defendant, or those in privity with him. The transfer of title does not take place until the judgment is completely satisfied, and the value of the property as ascertained by the court, has been paid to the plaintiff. Until such payment, therefore, there is no obstacle to prevent him from seeking redress in the courts against any one originally liable.<sup>4</sup> Title by judgment is one of the modes by which an absolute right to property may be obtained. On a

<sup>1</sup> Ingraham v. Dawson, 20 How. 486; Miller v. Rhoads, 20 Ohio S. 494; Murray v. Lovejoy, 2 Cliff. 191; Richardson v. Jones, 16 Mo. 177; Tarleton v. Johnson, 25 Ala. 300; Lovejoy v. Murray, 3 Wall. 1.

<sup>2</sup> Chicago v. Robbins, 4 Wall. 657; Chicago v. Robbins, 2 Black, 418.

<sup>3</sup> Gordon v. Hobart, 2 Sum. 40; Hillegas v. Hillegas, 5 Pa. St. 97.

<sup>4</sup> Osterhaut v. Roberts, 8 Cow. 43;

Morgan v. Chester, 4 Conn. 387; McGee v. Overby, 12 Ark. 164; Spivey v. Morris, 18 Ala. 254; Hyde v. Noble, 13 N. H. 501; Hepburn v. Sewell, 5 H. & J. 211; Smith v. Alexander, 4 Sneed, 482; Sanderson v. Caldwell, 2 Aik. 203; Jones v. McNeil, 2 Bail. 466; Elliott v. Hayden, 104 Mass. 180; Sharp v. Gray, 5 B. Monr. 4; Lovejoy v. Murray, 3 Wall. 1; Williams v. Otey, 8 Humph. 563.

recovery by law in an action of trespass or trover, of the value of a specific chattel of which possession had been acquired by tort, the title of the goods is altered by the recovery and transferred to the defendant.<sup>1</sup> If a party for an injury to his property elects to proceed by an action of trover or trespass for its value, the whole proceeding relates to the time of the taking or conversion; the controversy relates to the property as of that time; the criterion of damages is the value of the property at the time of such taking or conversion. The party in effect abandons his property as of that time to the wrong doer and proceeds for its value; so that when judgment is obtained and satisfaction made, the property is vested in the defendant by relation, as of the time of the taking or conversion. Thus, a declaration in trespass to real property alleged, by way of aggravation of damages, the taking and conversion of a fence. The fact of the conversion appeared *aliunde* to have been submitted to the jury. The judgment was held conclusive in another controversy between the same parties; that a satisfaction thereof by the defendant operated to transfer the fence to him, taking effect from the time of the conversion; and that the testimony of the first jurors that they did not include the fence in their assessment of damages was inadmissible to show that the title thereto did not pass.<sup>2</sup> And as to the original parties, the rule, applicable to all personal actions, is, that wherever two or more are liable *jointly* and not *severally*, a judgment against one, though without satisfaction, is a bar to another action against any of the other for the same cause; but it is not a bar to an action against a stranger. As far as an action in the form of tort can be said to be exclusively joint in its nature, this rule may govern it, but no further. In regard to joint contracts, a judgment against one alone is a bar to a subsequent action against the other.

§ 192. The interest of a bailor as well as a bailee in property is sufficient to authorize either to maintain an action against a party for its conversion of or for any injury to it. A judgment against a bailor in an action relating to the property, is a bar to a

<sup>1</sup> *Acheson v. Miller*, 2 Ohio S. 5; *Hepburn v. Sewell*, 2 H. & J. 211; 203; *Daniel v. Holland*, 4 J. J. Marsh. *Howard v. Smith*, 12 Pick. 202.

<sup>2</sup> *Smith v. Smith*, 50 N. H. 212.

subsequent action by the bailee.<sup>1</sup> So where an action is brought against a bailee for the property, and the bailor employs counsel and participates in or has full control of the action, and his title is put in issue in that action in order to maintain the bailee's defense, the judgment in such action is *res adjudicata* on the question of title and is conclusive as to the initial existence of such title at the time of the rendition of judgment.<sup>2</sup> A recovery and satisfaction by *either*, is a bar to any subsequent suit by the other; but a recovery and satisfaction in an *action commenced* by the bailee is no bar to an *uncommenced* action in the name of the bailor.<sup>3</sup> A bailee who delivers goods entrusted to him to a third person, in good faith, believing him to be the rightful owner, may take advantage, as an estoppel to an action brought against him by the bailor, of the judgment against the bailor in an unsuccessful action by the latter against the party to whom the goods were surrendered.<sup>4</sup> Upon this principle, the equitable assignee of a chose in action has been estopped by a verdict and judgment thereon, in the same manner as if he were a party to the record, the suit having been prosecuted in the name of another for his benefit, and at his request and expense.<sup>5</sup> So, a release by the assignee of a *chose* in action will bar an action by the assignor.

So A., acting without authority, submitted a matter to arbitration, assuming to act as the agent for B.: Held, that a prosecution on the award, made in B.'s favor by B.'s assignee, with trial and judgment thereon, established the validity of the award as effectually as if B. had not assigned it, and had sued on it in his own name; and that, as between the parties to it and their privies, such judgment was binding and could not be reviewed except on appeal.<sup>6</sup>

A judgment on the merits, on a *scire facias* to revive a judgment by an improper party may be pleaded as *res judicata* in a subsequent proceeding by the legal representative, it being in his

<sup>1</sup> Green v. Clark, 12 N. Y. 343.

<sup>2</sup> Tarleton v. Johnston, 25 Ala. 300.

<sup>3</sup> Steamboat v. McCraw, 31 Ala. 659.

<sup>4</sup> Burton v. Wilkinson, 18 Vt. 186;

Bates v. Stanton, 1 Duer, 79.

<sup>5</sup> Rogers v. Haines, 3 Me. 362; Gill v. U. S., 7 Ct. of Claims, 522; Piddicord v. Hill, 4 Mon. 350; Lutz v. Thomas, 3 Blitchf. 11; Hancy v. Richards, 2 Gdl. 216.

<sup>6</sup> Lowenstein v. McIntosh, 37 Barb. 251.

favor.<sup>1</sup> So a judgment against a claimant, upon the trial of the rights of personal property levied under execution, is conclusive evidence against such claimant, in a subsequent controversy between him and the purchaser at the execution sale.<sup>2</sup>

§ 193. A judgment against two joint debtors in an action of debt estops both in an action of one against the other, from denying the existence or obligation of the debt, without interfering with the right to prove that the whole burden of the obligation should be borne by the party who seeks to enforce it.<sup>3</sup> So a judgment in a suit by two for a trespass alleged to be on firm property, is conclusive as to the joint ownership in a subsequent proceeding by the defendant to set off against it a debt due from one plaintiff individually.<sup>4</sup> A defendant who claimed under a *donatio mortis causa*, was held to be within the estoppel of a judgment obtained by a creditor of the donor against his administrator, and estopped from showing fraud and collusion, or that there was no such debt as that sued upon.<sup>5</sup> Generally, no one can be within the estoppel of a judgment as a privy, unless his title accrues after the rendition of a judgment.<sup>6</sup> A vendee or assignee will therefore not be concluded by a judgment against the vendor or assignor prior to the sale or assignment. But to this rule there is an exception—that is, in cases of judgments *in rem*; as they are conclusive upon the whole world, they must necessarily be binding upon the assignee, regardless of the time of assignment.<sup>7</sup>

§ 194. In a recent case in the U. S. Supreme Court.<sup>8</sup> Wherein it was contended that the United States was bound in a manner similar to an individual landlord, Justice Bradley, in announcing the opinion of the court, said :

“The United States cannot be estopped by proceedings against its tenants or agents; and cannot be sued without its consent; and such consent can only be given by act of Congress. No state can pass a law making the United States suable in its courts. Without an act of Congress, no direct proceedings

<sup>1</sup> Withers v. Haines, 2 Pa. St. 435.

<sup>2</sup> Shirley v. Frame, 33 Miss. 653.

<sup>3</sup> Lloyd v. Barr, 11 Pa. St. 41.

<sup>4</sup> Collins v. Butler, 14 Cal. 223.

<sup>5</sup> Mitchell v. Pease, 7 Cush. 350.

<sup>6</sup> Campbell v. Hall, 16 N. Y. 575.

<sup>7</sup> Peck v. Bannum, 24 Vt. 376.

<sup>8</sup> Carr v. U. S., 98 U. S. 433.

will lie at the suit of an individual against the United States or its property; and no officer of the government can waive its privilege in this respect, nor lawfully consent that such a suit may be prosecuted so as to bind the government. The government can only hold possession of its property by means of its officers or agents; and to allow them to be dispossessed by suit, would enable parties always to compel the government to come into court and litigate its rights. Thus, if a proceeding would lie against the officers as individuals in the case of a marine hospital, it might be instituted with equal facility and right in reference to a post office or a custom-house, a prison or a fortification. Therefore, when it becomes apparent by the pleadings, or the proofs, that the possession assailed is the possession of the government by its agents, the jurisdiction of the court ought to cease; and its proceedings cannot be set up as an estoppel against the government." Thus: "The United States filed a bill to quiet the title to certain lots in its possession in San Francisco; the defendant set up, by way of estoppel, certain judgments in ejectment rendered by the State courts at the suit of his grantor, against certain officers of the government, who, as its agents, had possession of the lots; in those actions the district attorney, and additional counsel employed by the Secretary of the Treasury, appeared for the defendants, and the title was contested on the trial: *Held*, that these facts constituted no estoppel against the government, although, in California, a judgment in ejectment is, in ordinary cases, an estoppel both against the tenant in possession, and against the landlord who has notice of the suit. The cases in which the property of the government may be subjected to claims against it, are those in which the property is in juridical possession by the act of the government itself, or has become so without violating its possession, and it seeks the aid of the court to establish or reclaim its right therein:—in such cases it is equitable that the prior rights of others to the same property should be adjudicated and allowed."

§ 195. Where by an act of Congress the Attorney-General is authorized to direct the institution of a suit in the name of the United States, and a District Attorney has been thus directed, his power in this respect must be exercised in subordination to

those rules of procedure and those principles of equity which govern private litigants seeking to avoid a previous judgment against them. The United States, by virtue of their sovereign character, may claim exemption from legal proceedings, but when they enter the courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals. Unless otherwise provided by statute, the same rules as to the admissibility of evidence are then applied to them; the same strictness as to motions and appeals is enforced; they must move for a new trial or take an appeal within the same time and in like manner, and they are equally bound to act upon evidence within their reach. And when they go into a court of equity, for relief against a judgment, they must equally present a case by allegation and proof entitling them to equitable relief.

Although, on grounds of wise public policy, no statute of limitations runs against the United States, and no laches in bringing a suit can be imputed to them, yet the facility with which the truth could originally have been shown by them if different from the finding made; the changed condition of the parties and of the property from lapse of time; the difficulty, from this cause, of meeting objections which might, perhaps, at the time, have been readily explained; and the acquisition of interests by third parties upon faith of the decree, are elements which will always be considered by the court in determining whether it be equitable to grant the relief prayed. All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the Government be the suitor against him. Thus in a court of claims, the government, like an ordinary suitor, is subject to the principle of *res adjudicata*, and the defendant may, in a proper case, invoke the maxim *nemo debet bis vexari*.<sup>1</sup> So where the sovereign power confides to a tribunal a right to sell lands, and to determine between purchasers who has the better right, this power is exclusive and its determinations conclusive, not only on the parties claiming the right to purchase, but on the seller.<sup>2</sup>

<sup>1</sup> Fendall v. U. S., 14 Ct. of Cl. 247.

<sup>2</sup> U. S. v. Throckmorton, 98 U. S. 61; Cunningham v. Shanklin, 60 Cal.

119, Marquez v. Frishie, 41 Cal. 624;

Burrill v. Haw, 41 Cal. 222; Wilkinson v. Merrill, 52 Cal. 426; Langenor v. Shanklin, 57 Cal. 70.

§ 197. A State is bound by her judicial pleadings and admissions, the same as private persons, and is entitled to no greater right or immunity as a litigant, than they are. The doctrine of estoppel applies to the State just as it does to individuals. Nor is this rule of law varied by the fact that there are others interested in the subject-matter of the proceedings conducted by the State. If any persons have been injured by the action of the State, good faith and a sense of justice should incline the State to make reparation, as all other fiduciaries should do under like circumstances, even admitting their existence; but such conditions cannot affect the rules of law nor modify the liability and status of the State, in a judicial proceeding in a suit where the State seeks to recover the land as owner, and where the legal title under the federal grant was vested solely in the State.<sup>1</sup> So, where the State, by its proper officers, enters into an agreed case, if it is not bound by the agreement, it is in any event concluded by a judgment and decision to which it has not excepted.<sup>2</sup>

§ 198. A party is estopped by a judgment against him from disputing its correctness, so far as the point directly involved in the case was concerned; whether the reasons upon which the judgment is based were sound or not; and even if the reasons were not given. And as the parties themselves are estopped, so also are those who, since the judgment, claim to have acquired interest in the subject-matter of the judgment from or under the parties.<sup>3</sup>

<sup>1</sup> State v. Ober, 34 La. Ann. 361; Louis v. Trustees, 109 U. S. 162; Sharkey v. Frame, 33 Miss. 653; Thomas v. Odum, 31 Ala. 119; Timon v. Whitehead, 53 Tex. 290; Concomin v. Canal Co., 91 U. S. 741; Denme v. Smith, 129 Mass. 113; R. R. Co. v. Burk, 102 U. S. 14.

<sup>2</sup> State v. Porter, 86 Ind. 104.

<sup>3</sup> Hanson v. Armstrong, 21 Ill. 442; Brady v. McDaniel, 3 Jones L. 123; Shumake v. Nelms, 25 Ala. 120;

## CHAPTER IV.

## JUDGMENTS IN PERSONAM.

SECTION 199. In ejectment the verdict and judgment is conclusive of the title to the lessor of the plaintiff to *mesne* profits accruing after the day of the demise, during such time as the defendant has held the premises in question.<sup>1</sup> The statutes of New Jersey declare a judgment in ejectment conclusive as to the right of possession established by such judgment upon the party against whom it is recovered, and upon all persons claiming from, through or under such party by title arising after the commencement of such action, but provides that in certain cases it may be re-opened in three years. In Pennsylvania two verdicts and judgments in ejectment are necessary to render a judgment conclusive,<sup>2</sup> but upon an equitable title one judgment in ejectment is conclusive between the parties and a bar to any subsequent ejectment for the same land, and this rule includes all equitable titles. Actions upon equitable titles are regarded like bills in equity, and not as a possessory ejectment at common law, and a verdict and judgment therein will have the same conclusive effect as those which follow a final decree in a court of equity.<sup>3</sup> In order that a former ejectment may have force as evidence in a subsequent suit, it is necessary that it should have been not only between the same parties and for the same land, but also that it should have involved the same title.<sup>4</sup> And upon a judgment in ejectment to enforce or rescind a contract for the sale of land, one that is conclusive upon the rights of parties, whether the judgment is entered on the verdict of a jury or on an award of arbitrators<sup>5</sup> it must be regularly entered upon the record. In Ohio,

<sup>1</sup> Den v. McShane, 13 N. J. L. 35.

<sup>2</sup> Evans v. Patterson, 4 Wall. 224; Woolston's Appeal, 51 Pa. St. 452.

<sup>3</sup> Peterman v. Huling, 31 Pa. St. 432.

<sup>4</sup> Meyers v. Hill, 46 Pa. St. 9; Ste-

phens v. Strosnider, 92 Pa. St. 233;

Winpenny v. Winpenny, 92 Pa. St. 440; Chase v. Irvin, 87 Pa. St. 286;

Hill v. Oliphant, 41 Pa. St. 364.

<sup>5</sup> Seitzinger v. Ridgway, 4 Watts & S. 472; Amick v. Oyler, 25 Pa. St.

a judgment in ejectment is as conclusive as judgments in other actions, until reversed for error or annulled by an adverse recovery in a subsequent suit;<sup>1</sup> and also in Minnesota;<sup>2</sup> and are made conclusive by the statute in Iowa, but apply only to interests existing at the time of trial. In Kentucky, if in an action for the recovery of land a claim is set up for rents, issues and profits thereof, it is a bar to another and separate suit for rents, although the judgment is not a bar to a recovery for anything that he had a right to recover which was not claimed in the petition for the recovery of the land.<sup>3</sup> In Tennessee, the judgment is conclusive upon the party against whom it is recovered, and by title accruing after the commencement of the action on all claiming under and through him, provided the person against whom the judgment is recovered is not under disability at the time;<sup>4</sup> and the general, well-settled rule is that judgments in ejectment have the same effect as all other actions, and bind parties and privies thereto upon the subject-matter directly in issue, but will not bind strangers.

§ 200. There is no distinction in ejectment between a judgment by default and one obtained by a verdict. In the one case, the right of the plaintiff is confessed; in the other, it is tried and determined. Although when the fictitious forms in ejectment were abolished by statute the action is placed on the same basis as other actions in regard to the conclusiveness of judgments, and courts give them the same effect. Yet where a plaintiff is defeated in one action he will not be estopped in another action, where he claims under a new deed. Having a new title, he has the same right to assert it without prejudice from the former suit, that a stranger would have.<sup>5</sup> A judgment in ejectment in bar of the plaintiff's action from a want of his having the legal title to the premises is no bar to a second suit in ejectment by him upon an after-acquired legal title, the titles in the two suits not being the same.<sup>6</sup> In South Carolina, by the act of 1744, if the plaintiff in an action of trespass to try title suffers a judgment

<sup>1</sup> *Hinton v. McNeil*, 5 Ohio, 509.

<sup>2</sup> *Bass v. Arper*, 6 Minn, 496.

<sup>3</sup> *Walker v. Mitchell*, 18 B. Mon. 541.

<sup>4</sup> Tennessee Code.

<sup>5</sup> *Barrows v. Kindred*, 4 Wall. 399;

*Oetgen v. Ross*, 54 Ill. 79.

<sup>6</sup> *Hawley v. Simmons*, 102 Ill. 115.

against him, or is non-suited or discontinued, or otherwise drops his action, he must within two years thereafter commence a second suit, or else he is barred and estopped of his right and title, and as against him the title is absolutely vested in the defendant.<sup>1</sup> If the validity of a mortgage be tried and adjudicated in a suit in chancery, the decree binds parties and privies in an action of ejectment on the same mortgage.<sup>2</sup> Where the action of ejectment is brought for the purpose of settling the title and to establish the right of property as well as to recover possession, the judgment is *comprehensive* upon all parties.<sup>3</sup> And where the party brings an action for two parcels of land and recovers but one, or for a large tract and recovers but part thereof, the record, though silent as to the tract not recovered, is conclusive that the plaintiff is not entitled to it.<sup>4</sup> So where there was an averment of damages and the court fails to find upon the issue created by the denial of that averment, and no judgment is rendered for damages, the judgment is a bar any further action to recover the same damages.<sup>5</sup>

§ 201. In actions for *mesne* profits the judgment in the ejectment suit is *comprehensive* evidence against the tenant in possession, but not as to bind persons,<sup>6</sup> and is conclusive evidence for the plaintiff against the defendant or any person claiming under or through him, and the defendant is estopped in an action for *mesne* profits from setting up any defense which would have been a bar to the action in ejectment; he cannot set up a title in bar of the action even if he has a better one than the plaintiff.<sup>7</sup>

<sup>1</sup> *Dyer v. Lee*, 5 Serg. & R. 341; *Clark v. McKay*, 41 Cal. 221; *Wooden Stand v. Jackson*, 14 Wal. 134; *Clark v. Clarence*, 32 Iowa 240.

<sup>2</sup> *Clark v. Keeler*, 14 Wal. 399.

<sup>3</sup> *Briggs v. Kirtland*, 61 Vt. 300.

<sup>4</sup> *Stacy v. Keeler*, 14 Wal. 399.

<sup>5</sup> *Briggs v. Kirtland*, 61 Vt. 300.

<sup>6</sup> *Clark v. Lee*, 5 Serg. & R. 341.

<sup>7</sup> *Clark v. Lee*, 5 Serg. & R. 341.

<sup>8</sup> *Clark v. Lee*, 5 Serg. & R. 341.

<sup>9</sup> *Clark v. Lee*, 5 Serg. & R. 341.

<sup>10</sup> *Clark v. Lee*, 5 Serg. & R. 341.

<sup>11</sup> *Clark v. Lee*, 5 Serg. & R. 341.

<sup>12</sup> *Clark v. Lee*, 5 Serg. & R. 341.

<sup>13</sup> *Clark v. Lee*, 5 Serg. & R. 341.

<sup>4</sup> *Clark v. McKay*, 41 Cal. 221;

*Wooden v. Clarence*, 32 Iowa 280.

*Clark v. Evans*, 51 Mo. 39; *Min-*

*er v. Deane*, 62 Cal. 160.

*Clark v. Blackwith*, 35 Miss.

*Clark v. R. McKel*, 11 Wheat.

*Clark v. McKel*, 29 Tex. 581.

*Clark v. McDaniel*, 3 Jones L.

*Clark v. Nelson*, 25 Ala. 129;

*Clark v. Anderson*, 22 Ill. 442;

*Clark v. Jones*, 2 D. v. & Bat. 294.

*Clark v. Burhans*, 11 Johns

If the plaintiff in the action for *mesne* profits endeavors to recover for those which accrued antecedently to the day of the demise laid in the declaration in the ejectment, he cannot introduce the judgment in ejectment as evidence for him. In actions for *mesne* profits the verdict and judgment in the action of ejectment are conclusive of the plaintiff's right to recover the *mesne* profits only from the time the action of ejectment commenced down to the execution of the *habere facias*, and where *mesne* profits are claimed prior to the time of bringing the suit in ejectment, the question of title and of the possession of the defendants for such prior time is reopened, and neither the judgment in the ejectment suit nor any of the proceedings therein estop the defendants from having their rights again passed upon or the same evidence again submitted to a jury.<sup>1</sup> The action of ejectment is conclusive only from the time it is brought down to the execution of the writ of possession, and the judgment is not evidence of any matter which came collaterally in question.<sup>2</sup> But he may show, to relieve himself from liability, that he was not in possession after the service of the writ.<sup>3</sup>

§ 202. A judgment in ejectment, like all other judgments, binds only parties and privies; a tenant is *concluded* by the judgment in ejectment and cannot contravert the title. But where the action is brought against third parties, against persons

461; *Benzon v. Matsdorf*, 2 Johns. 369; *Baron v. Abeel*, 3 Johns. 481; *Jackson v. Randall*, 11 Johns. 405.

<sup>1</sup> *Kille v. Ege*, 83 Pa. St. 102; *Bailey v. Fairplay*, 6 Binn. 450; *Osborn v. Osborn*, 11 S. & R. 58; *Huston v. Wickersham*, 2 W. S. 313; *Postens v. Postens*, 4 W. & S. 313; *Drexel v. Man*, 2 Pa. St. 271; *Sopp v. Winpenny*, 68 Pa. St. 80; *Hare v. Fury*, 3 Yeates, 14.

*Hibbsman v. Dulleban*, 4 Watts. 191; *Lentz v. Wallace*, 17 Pa. St. 414; *Lamb v. Millar* 18 Pa. St. 450; *Martin v. Germandt*, 19 Pa. St. 127; *Hausen v. Ormsby*, 32 Pa. St. 201; *Tams v. Lewis*, 42 Pa. St. 410;

*Lewis's Appeal*, 67 Pa. St. 165; *Duchess of Kingston's Case*, 20 How. St. Trials, 578; *Moulton v. Libbey*, 15 N. H. 480; *Campbell v. Consalus*, 25 N. Y. 613; *Lane v. Harold*, 72 Pa. St. 267; *Warner v. Trow*, 36 Wis. 195; *Sobcy v. Beiler*, 28 Iowa. 235; *Miller v. Henris*, 84 Pa. St. 33; *Poston v. Jones*, 2 Dev. & Batt. 295; *Chirac v. Reinecker*, 11 Wheat. 280; *Whittington v. Christian*, 2 Rand. 353; *Den v. McShane*, 13 N. J. L. 25; *Leland v. Tousey*, 6 Hill, 328; *Benson v. Matsdorf*, 2 Johns. 369; *Clark v. Boyreau*, 14 Cal. 634; *Van Allen v. Rogers*, 1 Johns. Case, 251. But see *Stewart v. Dent*, 24 Mo. 111.

<sup>2</sup> *Miller v. Henry*, 84 Pa. St. 33.



tenant is concerned operates as an estoppel record.<sup>1</sup> The record of a judgment in an action of trespass *et* *contra* if the question of title was put in issue, tried, and passed upon, will preclude in a subsequent writ of entry between the same parties to recover the same land.<sup>2</sup>

§ 203. In California, in an action of ejectment, after the plaintiff's act, a judgment is conclusive upon the question of title in a subsequent suit between the same parties and their privies, where the title has been put directly in issue and determined in the first suit.<sup>3</sup> Where, under the laws of Maryland, an intestate was appointed by the probate court, as to the legitimacy of the person who claims to be appointed administrator of the estate of an intestate, on the ground that he is the intestate's nephew, the finding thereon is conclusive upon the question of legitimacy, as between the parties in an ejectment suit subsequently brought by the claimant.<sup>4</sup> Yet, where a plaintiff in ejectment is defeated in one suit, where he claimed through a power of attorney rightly ruled out on the trial as void, he will not be held to be concluded in a subsequent action where he claims under a new one made by the executors themselves. Having acquired a new and distinct title, he has the same right to assert it, without prejudice from the former suit, as a stranger would have had if passed to him.<sup>5</sup> A state statute, enacting that a judgment in ejectment (provided the action be brought in a form which gives precision to the parties and land claimed) shall be a bar to any other action between the same parties on the same subject-matter, is a rule of property as well as practice, and, being conclusive on title in the courts of the State, is conclusive also in those of the United States.<sup>6</sup> A judg-

<sup>1</sup> Hotchkiss v. Hunt, 56 Me. 252; McMillan v. Lacy, 6 Fla. 256; Hopkins v. McLaren, 4 Cow. 667; Briggs v. Wells, 12 Barb. 567; Stevens v. Taft, 8 Gray, 419; Cobb v. Arnold, 12 Met. 39.

<sup>2</sup> White v. Chase, 128 Mass. 158.

<sup>3</sup> Caperton v. Schmidt, 25 Cal. 479; Hayner v. Stanley, 12 F. R. 217; Marshall v. Shafter, 32 Cal. 176; Miles v. Caldwell, 2 Wall. 38; Blanchard v. Brown, 3 Wall. 249; Campbell v.

Rankin, 99 U. S. 263; Shinn v. Young, 57 Cal. 525; Betram v. Cook, 44 Mich. 396.

<sup>4</sup> Blackburn v. Crawfords, 3 Wall. 175; Fisk v. Miller, 20 Tex. 578; Lewis v. San Antonio, 26 Tex. 316; Parish v. Ferris, 2 Black. 607; Blanchard v. Brown, 3 Wall. 245.

<sup>5</sup> Barrows v. Kindred, 4 Wall. 399; Barrett v. Birge, 50 Cal. 655; Mays v. Wood, 50 Cal. 171.

<sup>6</sup> Miles v. Caldwell, 2 Wall. 35.

ment in ejectment binds the parties and their privies, and estops them from denying that the plaintiff was entitled to the possession of the premises at the time of its rendition. Privies are those who enter under the defendant in ejectment, or acquire an interest in or through him, or in collusion with him.<sup>1</sup> So where a plaintiff has been restored under a writ of restitution to the possession of the demanded premises in an action of ejectment, the defendant so evicted is estopped at law to deny that the plaintiff was rightfully restored and that his own prior possession was wrongful.<sup>2</sup> If, in an action of ejectment against a tenant, the landlord assumes the defense and puts his title in issue, the judgment rendered therein binds him as effectually as though he was made a party defendant.<sup>3</sup> So where a person is admitted to defend as landlord, he is estopped from making any defense which his tenant would he estopped from making.<sup>4</sup> A joint judgment in ejectment against several, if reversed as to one, is reversed as to all; it is either void *in toto*, or not at all.

§ 204. When a plaintiff avers title and right of possession in himself, and the defendant denies these allegations, and on the other hand avers title and right of possession in himself, the title is *prima facie* in controversy; and in such a case the judgment operates as an estoppel in any future litigation between the same parties, unless it should be shown that one of the parties was prevented from making his title available in the former suit by some temporary impediment, such as an outstanding lease or license, or that he had acquired some new title since the former judgment.<sup>5</sup> The doctrine that a judgment cannot be pleaded in bar or given in evidence by way of estoppel, arises from the fact that the action of ejectment at common law is between fictitious persons, and has no applicability to one action for possession of real property,

<sup>1</sup> Satterlee v. Bliss, 36 Cal. 489; Dimmick v. Derring, 32 Cal. 488; Marshall v. Shafer, 32 Cal. 176; Douglass v. Fulda, 45 Cal. 592; Russell v. Mallon, 38 Cal. 263; Wheelock v. Waischauer, 34 Cal. 265; Mahoney v. Van Winkle, 33 Cal. 459.

<sup>2</sup> Mann v. Rogers, 35 Cal. 316; Creery v. Everding, 54 Cal. 168. Harbin v. Roberts, 33 Ga. 45.

<sup>3</sup> Valentine v. Mahoney, 37 Cal. 389; <sup>4</sup> Wiggings v. Reddick, 8 Ired. 380. Calderwood v. Brook, 28 Cal. 126, <sup>5</sup> Shelly v. Dille, 3 Nev. 21; Mahoney v. Van Winkle, 33 Cal. 443; Imerson v. Sansome, 41 Cal. 552.

which is more like the writ of entry or assize than the old action of ejectment. One action, although called ejectment, seems to combine the properties of a writ of assize, of entry, and of right, and as such, a judgment in an action is an estoppel in regard to all titles litigated. But where, since the judgment, new rights and titles have accrued, it is no bar to another action. In States where the fictitious form of the action of ejectment formerly in use has been abolished, and issue is made by the parties in their real names, and the land is accurately described, a verdict and judgment in such action, where the title to the fee is in question, is a bar to a second trial for the same cause of action between the same parties<sup>1</sup> in the absence of statute law to the contrary.

But in Missouri it was decided (owing to a repeal of the statute) that there was no bar in such actions.<sup>2</sup>

In a late case<sup>3</sup> the rule is thus stated by the Supreme Court of that State: "At the common law, a judgment in ejectment was not a finality, whether the titles or defenses were the same or not. Nor is the common law rule changed by the Missouri statutes which have abolished *lease, entry* and *ouster*, and require the action to be brought in the real names of the parties. (Citing.)"<sup>4</sup> The common law rule has always been the law of this State, except while section 33, chapter 58 of the revision of 1855 was in force, which provided that judgment in ejectment, except of non-suit, should be a bar to any other action between the same parties, or those claiming by or under them as to the same subject-matter. The decision of Mr. Justice Miller, 4 Wall. 35, was based on the act of 1855, which was repealed in 1857, and the common law rule restored as it previously existed. It is a mistaken assumption that the sole reason for the ancient rule, in regard to the want of finality of judgments in ejectment, was the employment of fictitious parties in the proceedings. A judgment in ejectment con-

<sup>1</sup> *Amestri v. Castro*, 49 Cal. 325; *Sims v. Smith*, 19 Ga. 124; *Dickerson v. Powell*, 21 Ga. 143; *Caperton v. Schmidt*, 26 Cal. 479; *Parish v. Ferris*, 2 Black. 606; *Hodges v. Eddy*, 52 Vt. 434; *Kelsey v. Ward*, 38 N. Y. 83; *Thrust v. Troublesome*, Andr. 297; *Doe v. Bather*, 12 A. & E. N. S.

941; *Haight v. Paris*, 16 M. & W. 145; *Doe v. Gustard*, 5 Scott, N. R. 145; *Dawley v. Brown*, 79 N. Y. 390; *Stowell v. Chamberlain*, 60 N. Y. 572.

<sup>2</sup> *Fenwick v. Gill*, 33 Mo. 510.

<sup>3</sup> *Kimmel v. Benna*, 70 Mo. 52.

<sup>4</sup> 32 Mo. 185; 38 Mo. 304; *Ibid.* 552; 50 Mo. 86.

fers no title upon the party in whose favor it is given. 'It is therefore manifest that the judgment can never be final, and that it is always in the power of the party failing, whether claimants or defendants, to bring a new action.' This reason is just as applicable since the abolishment of lease, entry and ouster, as before. It is true, since the courts have allowed parol testimony to establish the matters actually litigated in a case without regard to the issues made by the pleadings, a change from the old law might be more plausible than when the courts held that to create an estoppel the precise point of the judgment must be made to appear from the record alone, and we do not undertake to say that such an innovation might not be wise and beneficial, although the experiment in 1855 did not prove an acceptable one, and holds us in doubt whether this State is willing to abandon the safeguards of the common law and place traffic in land on the same footing with horses and merchandise."

§ 205. A confession of judgment in ejectment is conclusive in a subsequent ejectment for the same land between the same parties or their privies. It must be treated upon the same general principles of law that belong to solemn or judicial confessions in other cases. The most important interests—not only property and liberty, but life itself—are habitually concluded judicially by solemn confessions made by the party in interest in the face of a court of justice. Is there any reason why ejectment should form an exception? In the nature of things, the interests involved in an ejectment suit are no more beyond the power of the party to control by his confession, than any other rights of persons or property. If he may confess his guilt in a capital case, he may most assuredly confess his want of title in ejectment, and a judgment confessed concludes and estops him and all his privies; this not upon the effect of the statute, but of the general principles of common law. It is a voluntary waiver of all defenses and of all rights under the statutes or at common law—a total and unconditional surrender of the field of controversy, which concludes him for ever.<sup>1</sup> And where the attorneys of both parties in an action of ejectment enter into an agreement in open court, submitting a question of boundary to the final decision of arbitrators,

<sup>1</sup> *Secrist v. Zimmerman*, 55 Pa. St. 446.

the award of the arbitrators and judgment thereon is conclusive in another action of ejectment between the same parties for the same land.<sup>1</sup> A disclaimer by a defendant in ejectment, unless withdrawn or amended by leave of court, operates as an estoppel of record of the part of the land disclaimed.<sup>2</sup>

§ 206. In regard to the conclusiveness of judgments in actions of ejectment, there is a vast difference in the different States in the Union, in the value attached to real estate, and to the title by which it is held, as compared with other species of property. But there can be no doubt that in all of them the feeling is far removed from that which formerly prevailed in England, or which prevails there even now. While some of our older States still maintain many of the safeguards of the common law, with its complicated system of conveyancing operating as a strong drag upon the facility and frequency of transfers of real property, in the Western States, the inhabitants traffic in land as they do in horses or merchandise, and sell a quarter-section of land as readily and easily as they do a horse or wagon. The laws of the people correspond with their habits. Deeds of conveyance are, by statute, rendered exceedingly simple and effectual, the main safeguard being a well-digested system of registration. In consonance with this general facility for traffic, it is their policy to prevent those endless litigations concerning titles to land, which, in other countries, are transmitted from one generation to another. The rapid settlement of a new country requires that a title once, fairly determined, shall not be again disturbed as between the same parties.”<sup>3</sup>

§ 207. In England ejectment is a possessory action ; the judgment, therefore, is not conclusive upon the mere right or title and cannot be pleaded in any subsequent suit, whether of ejectment or trespass, in which the title is in controversy ; while a judgment in trespass may be an estoppel in a subsequent eject-

<sup>1</sup> *Evans v. Kauphaus*, 59 Pa. St. 379. 4 Wall. 174; *Beebe v. Elliott*, 4 Barb. 457; *Sheridan v. Andrews*, 3 Lans.

<sup>2</sup> *Greely v. Thomas*, 56 Pa. St. 35; 129; *Campbell v. Hall*, 16 N. Y. 575; *Jordan v. Stevens*, 55 Mo. 361. *Castle v. Noyes*, 14 N. Y. 329; *Fitch*

<sup>3</sup> *Miles v. Caldwell*, 2 Wallace, 85, v. Cornell, 1 Sawyer, 156; *Oetgen v. Per Miller, J.*; *Sturdy v. Jackaway*, Ross, 54 Ill. 79.

ment, the estoppel of the judgment in ejectment does not extend to the title; it is limited only to the right of possession, and is conclusive in regard to that only, till reversed or set aside in another action of the same nature.<sup>1</sup> The defendant in an action of ejectment, against whom a judgment has been recovered, cannot deny the plaintiff's title in an action for *mesne* profits, for the simple reason that the only question in controversy in the action of ejectment was the plaintiff's right of possession, and not the absolute right to the land.<sup>2</sup>

§ 208. A verdict and judgment for the plaintiff in action for trespass *quare clausum fregit*, in which the question of the plaintiff's title was directly involved and adjudicated upon, will be conclusive evidence that he has a valid title in another action against the same defendant. Where a plaintiff has recovered in an action of trespass *qu. cl. fr.*, such recovery is *res adjudicata*, as between the parties, that plaintiff's possession, before the trespass in that suit complained of, was peaceable, and prior to defendant's, and of such a character as to entitle the plaintiff to retake it, if it could be done peaceably. Such judgment can be used, in any subsequent action of trespass to try title, by either of the parties or their privies for the recovery of the same land,<sup>3</sup> and will estop the defendant from alleging the same title in a subsequent action of ejectment: but if the defendant, after the rendition of the judgment, acquires title by purchase he is not estopped from alleging that fact, and such judgment will not be a bar, for the reason that the matter in issue is entirely different.<sup>4</sup> Where parties are bound by the estoppel of a former judgment in such an issue, when raised on

<sup>1</sup> *Aslin v. Parkes*, 2 Burr. 665; *Taylor v. Hordle*, 1 Burr. 60; *Wilkinson v. Kirby*, 15 C. B. 430; *Drexel v. Man*, 2 Pa. St. 200.

<sup>2</sup> *Doe v. Wright*, 7 Q. B. 263; *Doe v. Wells*, 2 Exch. 368; *Bailey v. Fairplay*, 6 Blinn. 450; *Lloyd v. Housse*, 3 Rawle, 49; *Chirac v. Reinecker*, 11 Wheat. 289; *Benson v. Matsdorf*, 2 Johns. 369; *Barrow v. Abeel*, 3 Johns. 481; *Jackson v. Ran-*

*dall*, 11 Johns. 405; *Van Allen v. Rogers*, 1 Johns. Cas. 28.

<sup>3</sup> *Coal Co. v. Cobb*, 82 Ill. 183; *Parker v. Leggett*, 12 Rich. L. 198.

<sup>4</sup> *Burt v. Steinbergh*, 4 Cow. 359; *Nivin v. Steven*, 5 Harr. 272; *Shettleworth v. Hughey*, 9 Rich. L. 387; *Warwick v. Underwood*, 3 Head, 238; *Whittaker v. Jackson*, 2 H. & C. 926; *Pieack v. Chambers*, 7 B. Mon. 565; *Ceul v. Johnson*, 11 B. Mon. 37.

the record in pleading, they must be equally bound, when it arises on the trial under the general issue.<sup>1</sup>

§ 209. The well-settled principle that a judgment negating the right of a plaintiff or defendant stated in his plea estops him in a subsequent action from asserting that right against the same party, may be further illustrated by the following cases: In an action on a promissory note, where the defense was fraud, and the judgment was rendered for the defendant, the verdict was held in another action on another note growing out of the same transaction, conclusive evidence of the fraud.<sup>2</sup> Thus, where the defendant pleaded want of consideration by reason of false representations of the vendor concerning the value of goods sold, in an action on a promissory note, and the plaintiff recovered judgment for part only of the note, the defendant was barred of his action for false representations.<sup>3</sup> So, in an action for interest due on a bond, a judgment for the plaintiff for the amount of the interest claimed will be conclusive evidence in an action on the bond, and estop the defendant from alleging fraud, for the reason that it was a defense which was available in the former suit, and the presumption is that it was so used;<sup>4</sup> and on the same principle, in an action of assumpsit for goods sold and delivered, a verdict against the vendee on the ground that the sale was fraudulent as against the vendor's creditors, is conclusive of fraud in a subsequent action between the same parties for other goods which were not included in the first action. So a judgment against a firm on a note made by one of the partners will be conclusive evidence of the existence of the partnership, the making of the note, and the right of the partner to bind the firm in a subsequent action brought by one of the firm to recover damages from the plaintiff in the former action for fraudulently taking the note for the individual debt of the maker; and the court held that the estoppel of the former judgment beyond the

<sup>1</sup> Small v. Leonard, 26 Vt. 209.

<sup>2</sup> Doty v. Brown, 4 N. Y. 71; Chase v. Walker, 26 Me. 555; Whirch v. Howard, 14 Ind. 455; Bank v. Edwards, 10 Gray, 387; Drake v. Peery, 65 Ill. 122; Bowman v. McKleroy, 15 La. Ann. 63.

<sup>3</sup> Burnett v. Smith, 4 Gray, 50.

<sup>4</sup> French v. Howard, 14 Ind. 455; Van Dolsen v. Abendroth, 43 N. Y. Sup. Ct. 470; Preble v. Supervisors, 8 Wis. 358; Edgell v. Sigerson, 26 Mo. 583; Cleveland v. Creviston, 93 Ind. 31; S. C., 47 Am. R. 367.

fact of the making of the note and the right to bind the firm, would not prevent a recovery in an action for damages, provided it could be done without controverting the issues which had been irrevocably settled in the first action.<sup>1</sup> A judgment upon an accounting between partners is conclusive as to all partnership matters between them.<sup>2</sup> And where defendants plead in abatement the non-joinder of others whom they claimed to be copartners, and succeed in their plea, the record is conclusive in another action against the parties setting up such plea that the persons alleged in their plea were partners.<sup>3</sup> So a judgment against several as copartners is conclusive, in a subsequent action between the same parties, of such partnership.<sup>4</sup> So a decision that a bankrupt's discharge was fraudulently obtained is conclusive of the fraud in another action where the discharge is pleaded. In an action for forcible entry and detainer, a judgment for the plaintiff will be conclusive as to the lawful possession of the land in action for assault committed by the defendant at the time of the entry, where the defendant attempts to justify on the ground that the legal possession is in him and not in the plaintiff.

§ 210. Whenever a judgment cannot be rendered without deciding specific issues, it will be conclusive on those issues in any future litigation between the same parties;<sup>5</sup> and where a judgment is rendered on one of two notes it will be conclusive in an action on the other, of the matters litigated and decided in the first, though it has to be shown by parol testimony, the record being silent on the matter. "It makes no difference whether the judgment is on a question of law or fact, for whenever the construction of an instrument has been judicially determined, it must be followed in every other action where the same issue arises between the same parties<sup>6</sup> and those in privity with them

<sup>1</sup> *Christian v. Pierce*, 7 Ga. 434; *Lynch v. Swanton*, 53 Me. 100.

<sup>2</sup> *Hayes v. Reese*, 34 Barb. 151.

<sup>3</sup> *Witmer v. Schattner*, 15 S. & R. 150.

<sup>4</sup> *Dutton v. Woodman*, 9 CUSH. 255.

<sup>5</sup> *Trustees v. Stocker*, 42 N. J. L. 115; *R. R. Co. v. Schutte*, 103 U. S. 118; *Hawes v. Water Co.*, 5 Sawyer,

287; *Bell v. Raymond*, 18 Conn. 91; *Perkins v. Walker*, 19 Vt. 144; *Gardner v. Buckbee*, 3 Cow. 124; *Treadwell v. Stebbins*, 6 Bos. 538, *Burt v. Sternburg*, 4 Cow. 559; *Hawley v. Simmons*, 101 Ill. 654.

<sup>6</sup> *Stewart v. Stebbins*, 30 Miss. 60; *Kingsland v. Spalding*, 3 Barb. 341; *R. R. v. R. R.*, 20 Wall. 137; *Edgell*

in law or estate." Thus, where the matter passed upon is the right under the language of a certain contract to take receipts on a railroad, the judgment concludes the question of the meaning of the contract in a suit for subsequent tolls received under the same contract.<sup>1</sup> So where a judgment has been rendered against a person upon a verdict of a jury, finding him to be an original promisor of a note in the suit specified instead of an indorser, he is estopped to deny that relation in any litigation with another party to the note.<sup>2</sup> So a judgment upon an issue of fact joined by the pleadings in an action is conclusive against the parties, although no relief is asked upon it or reference made to it in the petition.<sup>3</sup> However numerous the questions involved in a suit, if they were tried and decided, the renewal of litigation for any one of the same causes violates the doctrine of *res adjudicata* as much as if the first suit presented but one issue.<sup>4</sup> An adjudication by a competent tribunal is conclusive, not only in the proceeding in which it is pronounced, but in every other where the right or title in controversy is the same, although the cause of action may be different, between the same parties or their privies. Thus a former adjudication in a suit to recover taxes paid on certain lands for certain years is conclusive in another suit between the same parties and their privies, to recover taxes paid on the same land for subsequent years, when the payments for all the years were made in the same right, without any change in the relation of the parties or of the law governing their rights, where in the former action the bill was dismissed without prejudice as to a *part* of the lands, but the gross amount of taxes claimed to be recovered was agreed to have been paid

v. Sigerson, 26 Mo. 583; Shirley v. Fearne, 33 Miss. 653; Manly v. Kidd, 33 Miss. 141; Bloodgood v. Carsey, 31 Ala. 515; Sturdevant v. Randall, 53 Me. 149; Wilson v. Davol, Bosw. 619; R. R. Co. v. Wynne, 14 Ind. 350; City, &c. v. Taylor, 11 B. Mon. 361; Jackson v. Lodge, 36 Cal. 28; Freer v. Steelenbur, 2 Abb. App. 189; Schoch v. Foreman, 3 Brews. 157; Bank v. Edwards, 10 Gray, 387;

Hanford v. Fitch, Conn. ; Bick v. McKensie, 7 Daly, 265; Jackson v. Miller, 41 Mich. 90; Buchanan v. Smith, 75 Mo. 463.

<sup>1</sup> R. R. Co. v. R. R. Co., 20 Wa. 137.

<sup>2</sup> Sturdevant v. Randall, 53 Me. 14

<sup>3</sup> McGregor v. McGregor, 21 Iowa 441.

<sup>4</sup> Whitehurst v. Rogers, 38 M. 503.

on *all* the lands *held*, and adjudication as to the recovery of the taxes paid on all the lands.<sup>1</sup>

§ 211. When a former judgment is used by way of an estoppel, the plaintiff may reply, that it did *not relate* to the same property or transaction in controversy in the action to which it is set up in bar: and the question of identity thus raised is determined by the jury, upon the evidence adduced.<sup>2</sup> And though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet, if, upon the whole record it is doubtful whether the same subject-matter was actually passed upon, parol evidence will be admitted to show the truth. If, in the pleadings, there are several distinct counts, the evidence may have referred to either, or all, with equal propriety; the judgment, in such a case, is only *prima facie* evidence upon any one of the counts, and evidence *abunde* is admissible to rebut it.<sup>3</sup> Parol evidence is admissible to show what facts, not inconsistent with the record, were necessarily or actually the basis of the finding;<sup>4</sup> where the record is silent; and in aid of the

<sup>1</sup> Goodenow v. Litchfield, 59 Iowa, 226.

<sup>2</sup> Packet Co. v. Sickles, 24 How. 323; Jonson v. Smith, 15 East, 213; Whittemore v. Whittemore, 2 N. H. 26; Parker v. Thompson, 3 Pick. 429; Phillips v. Berick, 16 Johns. 136; Wheeler v. Van Houten, 12 Johns. 311; Coleman's Appeal, 62 Pa. St. 252; R. R. Co. v. Daniel, 20 Gratt. 363; Spradling v. Conway, 51 Mo. 51; White v. Simonds, 33 Vt. 178; Badger v. Titcomb, 15 Pick. 416; Webster v. Lee, 5 Mass. 334; Golightly v. Jellicoe, 4 T. R. 147; Seddon v. Tutop, 6 T. R. 607; Smith v. Talbot, 11 Ark. 666; Easton v. Bratton, 13 Tex. 30; Wilcox v. Lee, 1 Rob. N. Y. 355; Perkins v. Parker, 10 Allen, 22.

<sup>3</sup> Sawyer v. Woodbury, 7 Gray, 499; Packet Co. v. Sickles, 5 Wall. 580; Carter v. James, 13 M. & W. 137; Strother v. Butler, 17 Ala. 723; Cook v. Burnley, 45 Tex. 97; Smith v. Talbot, 11 Ark. 666; Hungerford's

Appeal, 40 Conn. 322; Sweet v. Maupin, 65 Mo. 65; Day v. Vallette, 25 Ind. 42.

<sup>4</sup> King v. Chase, 15 N. H. 9; Littleton v. Richardson, 34 N. H. 179; Taylor v. Dustin, 43 N. H. 493; Smith v. Smith, 50 N. H. 212; Bascom v. Manning, 52 N. H. 132; Sanderson v. Peabody, 58 N. H. 116; Morgan v. Burr, 58 N. H. 470; Cromwell v. Sac Co., 94 U. S. 351; Campbell v. Rankin, 99 U. S. 261; Packet Co. v. Sickles, 5 Wall. 580; Atwood v. Robbins, 35 Vt. 530; Emery v. Fowler, 39 Me. 326; Walker v. Chase, 53 Me. 258; Lander v. Arno, 65 Me. 26; Burren v. Shannon, 14 Gray, 433; Merritt v. Moise, 108 Mass. 270; White v. Chase, 128 Mass. 158; Clapp v. Herrick, 129 Mass. 292; Clark v. Blair, 14 Fed. R. 812; Sherman v. Dilley, 3 Nev. 21; Terry v. Berry, 13 Nev. 523; Bert v. Steinberg, 4 Cow. 559; Doty v. Brown, 4 N. Y. 71; Bissell v. Kellogg, 60 Barb. 627; Wood v. Jackson,

judgment to identify the parties,<sup>1</sup> as well as to identify the controversy and show that the matters in issue and decided in the first action are the same as those presented for determination in the second.<sup>2</sup> This is a question of great delicacy. Courts should take care not to tempt persons to try experiments in one action and when they fail, to suffer them to bring other actions for the same demand. The plaintiff who brings a second action ought not to leave it to nice investigation to see whether the two causes of action are the same. He ought to show beyond all controversy that the second is a different cause of action from the first in which he failed.<sup>3</sup>

Where one wrongfully takes another's horse, and sells him applying the money to his own use, a verdict and judgment in trespass, in an action by the owner, for the taking, will be effectual as an estoppel in an action of *assumpsit* for the money received, or for the price, the cause of action being proved to be identical.<sup>4</sup> And upon this same principle, if a plaintiff declares on two counts, as, for instance, one on a promissory note, and the other for goods sold, and takes a judgment for the note, but offers no evidence on the other count, it will not be a bar to another action for goods sold; but if the plaintiff had adduced evidence on the count for goods sold and delivered, and the judgment had included this with the other demand, it can be pleaded as a judgment recovered upon the same cause of action so an adjudication of indebtedness upon an item of account by one court will be a bar to an action upon it in another, notwithstanding it was not the intention of the plaintiff to include it in

8 Wend. 44; *Young v. Rummell*, 2 Hill, 480; *Beebe v. Elliott*, 4 Barb. 457; *Boucharde v. Dias*, 3 Demo. 328; *Russell v. Place*, 94 U. S. 606; *Davis v. Brown*, 94 U. S. 423; *Tutt v. Price*, 7 Mo. App. 194; *Supples v. Cannon*, 44 Conn. 424; *Carter v. Shibles*, 74 Me. 273; *Bank v. Schulenberg*, 48 Mich. 109; *Gates v. Bennett*, 23 Ark. 475.

<sup>1</sup> *R. R. Co. v. Yeates*, 67 Ala. 164; *Tarleton v. Johnson*, 25 Ala. 300.

<sup>2</sup> *Jones v. Miller*, 3 Fed. R. 384.

<sup>3</sup> *Spurlock v. R. R. Co.*, 76 Mo. 67;

*Banks v. Burnam*, 61 Mo. 77; *Kell v. Hurt*, 61 Mo. 463.

<sup>4</sup> *Seddon v. Tutop*, 6 T. R. 607.

<sup>5</sup> *Ware v. Percival*, 61 Me. 391; *Liebermore v. Hershel*, 3 Pick. 33; *Norton v. Doherty*, 3 Gray, 373; *Young Black*, 7 Cranch, 565.

<sup>6</sup> *Seddon v. Tutop*, 6 T. R. 607; *I. R. Co. v. Daniel*, 20 Gratt. 366; *Thorpe v. Cooper*, 15 E. C. L. 387; *Deacon v. R. R. Co.*, 6 U. C. C. P. 241; *Hudley v. Green*, 2 Tyr. 390; *Bridge v. Gray*, 3 Pick. 25; *Webster v. Lee*, 5 Mass. 33; *Phillips v. Berrick*, 16 Johns. 136.

the former action. The fact that it was presented and submitted with the case will be conclusive of the adjudication. Thus where the plaintiff sued the defendant on an account in which was the following item: "To amount of R. P. B., \$200," evidence was introduced in relation to said item, but which way or what determination was made of it did not appear. In another action, brought upon this item, it was found by the court that plaintiff "did not intend to include said claim in the former suit, although he held the same at the time, and it might have been included in said claim." But the Supreme Court, on appeal, said that this demand was included in the other suit, that evidence was introduced thereon, and on the whole case. It is not a material question as to whether plaintiff was allowed this item in the other action or not. If it was presented, evidence introduced upon it, and it was not withdrawn but submitted with the case, the judgment is a complete bar, and the plaintiff cannot now be heard to say that he did not intend to include this claim in the other suit.<sup>1</sup>

§ 212. The judgment must be on the merits. If the real merits of the action are not decided in the first, the prior judgment is no bar.<sup>2</sup> Generally, where questions of this kind arise, regulating the identity of the matters litigated in the former suit, parol evidence is admissible, to show what transpired on the former trial, in order to explain the record;<sup>3</sup> and if the record shows that the same cause of action was apparently determined in the first suit, it will be *prima facie*, but not conclusive evidence that it has passed "*in rem judicatum*;" and the burden of proving that it did not, is upon the party against whom the record is used. Where the party against whom a record is sought to be used fails to offer any evidence to show that the general verdict

<sup>1</sup> Street v. Beckman, 43 Iowa, 496; Baker v. Stinchfield, 57 Me. 363; Barrett v. Failing, 8 Oreg. 152

<sup>2</sup> Seden v. Tutop, 6 Term R. 607; Bagot v. Williams, 3 B. & C. 240; Thorpe v. Cooper, 5 Bing. 129; Snider v. Croy, 2 Johns. 277; Dickenson v. Hayes, 31 Conn. 423; Preston v. Pecke, E. B. & E. 336; Post v. Smilie, 48 Vt. 185; Wright v. Salisbury, 46 Mo. 26;

Burwell v. Knight, 51 Barb. 267; Phillips v. Berick, 16 Johns. 126; Colwell v. Bleakley, 1 Abb. Ct. App. Dec. 400; Sawyer v. Woodbury, 7 Gray, 499; Dunlap v. Glidden, 31 Me. 517; Baker v. Stinchfield, 57 Me. 363; Supples v. Cannon, 44 Conn. 424; Payne v. Ins. Co., 12 R. I. 440

<sup>3</sup> McDermott v. Hoffman, 70 Pa. St. 52.

in the prior action was not rendered upon the issue involving the merits, the judgment in the first suit, instead of being *prima facie* evidence for the party in whose favor it was rendered, is *conclusive*.<sup>1</sup> Hence, in order to know what is within the estoppel of a judgment, it is necessary to go beyond the judgment, first to the demand or cause of action, and next to the defense or answer made by the defendant, and regard every question as finally adjudged against the unsuccessful party, which would have the effect of an estoppel for him, if determined in his favor. This is the rule, where the point is set forth definitely on the record, and also where the general issue is substituted for the special plea, where the questions raised by the evidence and presented to the jury can be ascertained with certainty from the testimony of witnesses or the decision of the judge before whom the cause is tried.<sup>2</sup> While the evidence of a juror is admissible to show the identity of the subject-matter in different actions, it cannot be received to contradict the record.<sup>3</sup> But the rule never has been extended to the introduction of evidence showing the action taken by the jury, or what matters were considered by them. To do so might tend to the contradiction of the record; and this is not permissible.

§ 213. A fact is not less at issue or within the conclusion of the verdict, because it is comprised in a general traverse or averment, and the only difference between the cases, where the issue is general, embracing various matters, and those where it is limited to a single point, is, that the estoppel, which appears by the mere inspection of the record in the one case, must be made out by evidence in the other; so that, when what was actually decided in a former suit can be ascertained by parol evidence, it will be an estoppel, notwithstanding the ambiguity of the record, or a change in the form in which the question is presented.<sup>4</sup> So, a

<sup>1</sup> White v. Simonds, 33 Vt. 178; Day v. Vallette, 25 Ind. 42.

<sup>2</sup> White v. Simonds, 33 Vt. 178. Burden v. Shannon, 99 Mass. 200; Lea v. Lea, 99 Mass. 493.

<sup>3</sup> Stapleton v. King, 40 Iowa, 278; Crum v. Boss, 48 Iowa, 433.

Jackson v. Lodge, 36 Cal. 28;

Hungerford's Appeal, 41 Conn. 322; Bottorf v. Wise, 53 Ind. 32; Hickerson v. Mexico, 58 Mo. 61; McDermott v. Hoffman, 70 Pa. St. 31; Hughes v. Jones, 2 Md. Ch. 178; Walker v. Chase, 53 Me. 258; Hood v. Hood, 110 Mass. 463; Lander v. Arno, 65 Me. 26; Sage v. McAlpin, 11 Cush.

verdict for the defendant in an action brought for the recovery of a chattel, which was conveyed by a deed, which is put in evidence at the trial, and relied on as a source of title, will be conclusive of the validity of the deed in a subsequent suit for another chattel comprised in the same instrument.<sup>1</sup> When a question litigated in a second suit is the same as that decided in the first, the estoppel will not be less binding, because the cause of action is different, and the identity of the points actually in dispute cannot appear without extrinsic proof.<sup>2</sup> Thus a decision that the defendant did not owe the plaintiff contribution on one bond, was held to estop him from recovering it on another, given at the same time and in course of the same transaction, although parol evidence was necessary to apply the bar of the former proceeding to the demand in suit.<sup>3</sup>

§ 214. A traversable fact, put in issue in a court of competent jurisdiction between the same parties, and tried by that court, is a bar to another action, based on the same fact, although the relief asked in the last case is different from that in the first. Thus, a suit by the wife for alimony, based on the desertion of the husband on a given day, and which is denied by the husband and found against him, is a bar to an action for divorce, by the hus-

165; Caperton v. Schmidt, 26 Cal. 479; Lee v. Kingsbury, 13 Tex. 681; Embury v. Conner, 3 N. Y. 511; Doty v. Brown, 4 N. Y. 71; Harris v. Harris, 36 Barb. 38; Kerr v. Bank, 18 Md. 336; Sawyer v. Woodbury, 7 Gray, 449; Jennison v. West Springfield, 13 Gray, 514; Buren v. Shannon, 14 Gray, 433; Packet Co. v. Sickles, 24 How. 333; Babcock v. Camp, 12 Ohio S. 11; Dutton v. Woodman, 9 Cush. 255; Smith v. Way, 9 Allen, 472.

<sup>1</sup> Castle v. Noyes, 14 N. Y. 329; Freer v. Stotenburgh, 2 Abb. App. 189; Bush v. Knox, 5 B. & C. 130; Bunker v. Tuffts, 57 Me. 417; Doty v. Brown, 4 N. Y. 71.

<sup>2</sup> Outram v. Morewood, 3 East, 346; Hitchin v. Campbell, 2 W. Bl. 827;

Whittaker v. Jackson, 2 H. & C. 926; Hancock v. Welsh, 1 Stark. 347; Routledge v. Hislop, 2 E. & E. 549; Huffer v. Allen, L. R. 2 Exch. 15; Pearse v. Coake, L. R. 4 Ex. 92; Lawrence v. Vernon, 3 Sumn. 20; Ware v. Percival, 61 Me. 391; Bunker v. Tuffts, 57 Me. 417; Spencer v. Dearth, 43 Vt. 98; Lindsey v. Danville, 46 Vt. 144; Livermore v. Heischel, 3 Pick. 33; Merriam v. Woodcock, 104 Mass. 326; Betts v. Starr, 5 Conn. 550; Gardner v. Buckbee, 3 Cow. 120; Collins v. Bennett, 46 N. Y. 490; Barker v. Cleveland, 19 Mich. 230; Kreuch v. Dehler, 50 Ill. 176; Owens v. Raleigh, 6 Bush, 656; Harbin v. Roberts, 33 Ga. 45; Perry v. Lewis, 49 Miss. 443; Taylor v. Castle, 42 Cal. 367; Smith v. Smith, 50 N. H. 212.

<sup>3</sup> Bouchand v. Dias, 3 Denio, 238

band against the wife, based on the desertion of the wife at the same time. A cause of action, having for its ground or foundation the same matters as are decided upon in a former suit between the same parties, is barred by the former suit.<sup>1</sup> Thus, a judgment in an action of contract for a breach of an agreement to discharge an execution is a bar to an action of tort, in which the same facts are alleged as in the former suit, with the addition of an averment of special damages resulting from an arrest on the execution.<sup>2</sup>

§ 215. In the case of *Sheldon v. Edwards*,<sup>3</sup> the learned judge says, "That the question whether the former suit and judgment thereon was bar to the action, depends upon the question whether it was a judgment upon the whole merits. The same defense was set up in the answer there, as in this suit. The facts were particularly found there, though not all precisely as they are in this suit. On the judgment there can be no dispute or denial that both issues were distinctly passed upon, found and adjudged; the same defense was pleaded, the facts found and the law adjudged. Why, then, was it not a bar to this action? It is said that where the action is dismissed or judgment given for the defendant upon a preliminary point before reaching the merits, it is no bar to another action.<sup>4</sup> No one can dispute the soundness of the rule, but these cases have no sort of application to this one. Take a plainer case; an action is brought upon a draft before the days of grace had expired. The defendant answers: first, that the draft is usurious; second, that it was paid; third that it was premature. The defendant being entitled to grace the court found each issue for the defendant, and judgment was accordingly entered. Can any court assume to say that the judgment was given upon one issue more than upon another, when the record shows it was given alike upon all? Can it be denied that each of these issues was tried and adjudged? What court then can detract from the power or force of the consequences flowing upon such judgment upon the issues? It is stated that

<sup>1</sup> *Kalisch v. Kalisch*, 9 Wis. 529; *Roberts v. Heim*, 27 Ala. 678; *Lee v. Kingsbury*, 13 Tex. 68; *Baker v. Stinchfield*, 57 Me. 363.

<sup>2</sup> *Smith v. Way*, 9 Allen, 472.

<sup>3</sup> 35 N. Y. 286; *Oleson v. Merrihew*. Wis. L. News, 110.

<sup>4</sup> *Hughes v. Blake*, 1 Mason, 515; *Estill v. Taul*, 2 Yerg. 467; *R. R. v. Lewis*, 8 Pick. 113.

estoppels must be mutual; that if these issues upon the merits had been found the other way, and the complaint dismissed because the action was prematurely brought, there would have been no estoppel against the defendant from trying them again if another action was brought. This seems plausible, but I think unsound. It is the judgment upon the findings that makes the estoppel. If the judgment be one of nonsuit, or in the nature of a nonsuit, and the action be dismissed, nothing whatever is adjudged in respect to a subsequent suit. It is no bar to anything; an action is brought on a draft, and the plaintiff, after evidence on both sides, is nonsuited, judgment of nonsuit entered and paid. The next day he brings the same action again, and succeeds; the former of course being no bar. But suppose, instead of a nonsuit, the judgment had been for the defendant upon the merits, because he failed to prove the defendant's handwriting, it is equally clear that the judgment would have been binding and a bar, whether it was founded on the finding of a court or referee or the verdict of a jury." As a further illustration of this principle, a second action of replevin to recover certain personal property mortgaged to appellee to secure a promissory note, was commenced. A similar suit had been brought before, and judgment rendered for appellant, because no demand had been made by appellee before the suit was brought. A demand was duly made before the bringing of the second suit. The defendant pleaded estoppel by the former adjudication, but the plaintiff had judgment in his favor. The court said, "If a demand was necessary, and the appellee was defeated in the former action for the want thereof, he is not estopped from maintaining this action. The action of replevin will not lie unless the goods were wrongfully taken or are unlawfully detained. It was stipulated in the mortgage in question that appellant was to retain possession of the property until the debt became due. The detention of the property after the debt became due was not unlawful until a demand was made for it; and an action of replevin to recover such property could not, therefore, be maintained without this action; and the former suit having failed for want of a demand, it constitutes no bar to this action."<sup>2</sup>

<sup>1</sup> *Sheldon v. Edwards*, 35 N. Y. 286.    <sup>2</sup> *Roberts v. Norris*, 8 C. L. J. 39.

Thus, in an action by attachment, in addition to the indebtedness for which judgment was prayed, plaintiff set out a note not yet due, alleging that it was a lien upon the attached property, and asking that any surplus arising from the sale of such property be applied to its payment; its validity was acknowledged by the defendant, who pleaded a counter claim. Before the trial, the note matured; it was offered in evidence and considered by the jury in arriving at their verdict. To a subsequent action upon the same note, defendant pleaded the former judgment. *Held*, that no judgment having been prayed thereon in the former case, the note was not in issue as a cause of action under the pleadings, and the judgment therein was not a bar to a future recovery. In this case the court say: "The attachment, as we understand, only issued for the claims due. Therefore the allegations in the petition, in reference to the note sued on in this action, must be regarded as surplusage. It is further alleged in the answer: 'That said cause (the former action) was submitted to the jury and the said note in this action sued on was . . . offered in evidence, both as a cause of action and ground of recovery and to reduce or defeat defendants' counter-claim thereon; that the jury in the determination of the question of indebtedness . . . considered the note sued on in this action, and in arriving at their verdict charged B. with the full amount thereof and allowed C. the full amount of said note.' A judgment is only conclusive on the matters which are directly in issue, and not those which are brought incidentally into a controversy during a trial. Ordinarily, the pleadings in a case constitute, make, define and limit the matters in issue." If, under the pleadings in the former action, the plaintiff could not obtain judgment on the note if introduced in evidence and the proof entitled him thereto, it would seem necessarily to follow that no judgment could be rendered which would bar his right of action thereafter. It is wholly immaterial what the jury did—whether they allowed, disallowed or considered the note in arriving at their verdict. The only question is, did the note sued on constitute an issue in the former action? If the rule be established that the action taken by a jury determines what has been adjudicated, much un-

<sup>1</sup> *Crum v. Boss*, 48 Iowa, 233.

<sup>2</sup> *Allen v. Newberry*, 8 Iowa, 65.

certainty must prevail! Their action, whether right or wrong, can have no effect on the question presented."

§ 216. What is meant by an estoppel being mutual is, that the particular judgment is binding upon both, if obligatory upon either. The merits having been determined in the former suit, and judgment entered thereon, it is conclusive upon both parties until reversed. It is entirely mutual. In order that a judgment in another action between the same parties shall constitute an estoppel, it should appear that the identical questions involved in the issue tried were passed upon by the court or jury at the former trial.<sup>1</sup> It must, therefore, be clearly evident that a former judgment cannot operate as an estoppel to another action, unless the subsequent suit is not only founded upon the same contract or transaction as that litigated in the first, but that the subsequent action is brought for the wrong or redress which the party sought in the first action.<sup>2</sup> So, a judgment for a defendant in an action brought to recover damages for an alleged deception in inducing the plaintiff to enter into a contract, can be no defense to an action on the contract<sup>3</sup> or on a bond given for the fulfillment of the contract, because a judgment that a contract was not procured or void for fraud, can be no reason why it should not be enforced.<sup>4</sup> Every fact which exists on record must be proved by the record, but when the question is as to the real subject-matter of the suit, or to show a bar to another suit, or to lay the foundation of an action of indemnity, the identity of the cause of action may be proved by other than record evidence.<sup>5</sup> Whether any

<sup>1</sup> *Kerr v. Hays*, 36 N. Y. 331; *Barker v. Cleveland*, 19 Mich. 230; *Bigelow v. Winsor*, 1 Gray, 299; *Merriam v. Woodcock*, 104 Mass. 326; *Eastman v. Cooper*, 15 Pick. 285; *Vermeil v. Harper*, 28 La. Ann. 803; *Boynton v. Morrill*, 111 Mass. 4; *Hood v. Hood*, 110 Mass. 463; *Vincennes, The*, 3 Wall. 171; *Potter v. Baker*, 19 N. H. 166; *Lord v. Chadbourne*, 42 Me. 429; *Bank v. Edwards*, 10 Gray, 287; *Kirkpatrick v. Stingley*, 2 Ind. 169; *Frantz v. Ireland*, 4 Lans. 278.

<sup>2</sup> *Bierner v. Bigelow*, 8 Kas. 496

*Tams v. Lewis*, 42 Pa. St. 402; *Kelsey v. Murphy*, 26 Pa. St. 78; *Clemens v. Clemens*, 28 Wis. 637; *Dixon v. Merritt*, 21 Minn. 196; *Barker v. Cleveland*, 19 Mich. 230.

<sup>3</sup> *Harris v. Hammond*, 18 How. P. 123; *Stevens v. Miller*, 13 Gray, 235; *Ware v. Percival*, 61 Me. 391; *Wanzer v. Debaun*, 1 E. D. Smith, 261; *Norton v. Doherty*, 3 Gray, 372.

<sup>4</sup> *Finley v. Hanbest*, 30 Pa. St. 190.

<sup>5</sup> *Parker v. Thompson*, 3 Pick. 429; *Killhoeffer v. Herr*, 17 S. & R. 319.

matter has been tried between the same parties, and has been decided before, is a fact depending partly on parol evidence and partly on the record. But while a record can be explained, it cannot be added to or contradicted, and where a record distinctly shows what matters were in issue and decided, parol evidence will not be allowed to show that other matters not within the issue were likewise adjudicated.<sup>1</sup> Parol evidence may be received for the purpose of showing whether or not a certain question was determined in a former suit. After a record of a former judgment has been put in evidence, it may always be followed by such parol evidence as may be necessary to give it its proper effect to show the scope and extent of the decision; either to show that the issues actually determined were in fact broader and more extensive than what appears on the face of the judgment itself, or to show that some fact was not passed upon and determined at all, which apparently on the face of the record was adjudicated in a former suit. Parol evidence cannot be lawfully admitted to contradict a record. But in a general verdict and judgment, however conclusive is the judgment of all matters adjudicated, it is, in most cases in general assumpsit or book account, absolutely necessary to resort to parol evidence to ascertain whether certain specific items of book account or claims in assumpsit, were submitted and adjudicated in the trial of the case, or not; and when the fact is ascertained that an item or claim was submitted and considered, the claim becomes merged in and concluded by the judgment, and has, thereafter, no existence as a claim for litigation or dispute.<sup>2</sup>

§ 217. But where a plaintiff brings an action against a defendant, and the declaration contains several causes of action, and he gives evidence on all the counts, but for want of evidence fails in establishing some of them, the judgment is an estoppel to another action on the counts he has failed to sustain, and if a claim i

<sup>1</sup> Price v. Dewey, 6 Sawyer, 493; Morey v. King, 51 Vt. 383; Manning v. Irish, 47 Iowa, 650; Sitzennick v. Lucas, 1 Esp. 44; son, 48 Tex. 133; Harvey v. Drew, 8 Ill. 606; Underwood v. French, 6 Oreg. 66.

<sup>2</sup> Gray v. Pingry, 17 Vt. 415; Spooner v. Davis, 7 Pick. 140; Armstrong v. St. Louis 69 Mo. 309; Clemens v. Clemens, 37 N. Y. 51; S. C., 32 Am. R. 499; Roberts v. John- Post v. Smith, 48 Vt. 185.

submitted to a jury, and they disallow it or allow less than the plaintiff is entitled to recover, the verdict and judgment is a conclusive bar to another action for the same cause.<sup>1</sup> Thus, S. had sold and delivered to D. several lots of staves, all at a price fixed by a contract, whereby S. was to deliver and D. to accept all the staves to be got out by S. in 1863. After all the staves had been delivered, S. sued D. upon the contract, and the case went to judgment. During the trial S. failed, by reason of the absence or drunkenness of a witness, to prove an item of 2,546 staves, and that item he withdrew from the jury. He afterward sued D. to recover for the item thus withdrawn: *Held*, that the item being within the former declaration, and being a part of the articles furnished under a single contract entirely executed, the case could not be distinguished from any other in which a party has failed for lack of proof; and the former judgment was a final determination of the damages to which S. was entitled under the contract,<sup>2</sup> and where, through error of the referee in a previous suit, the plaintiff failed to recover the whole amount due on a bond upon which the action was brought, the judgment will, nevertheless, bar a second suit upon the bond to recover the residue.<sup>3</sup> So where a declaration contained a count in trover and another in trespass, there was a general verdict for the plaintiff and judgment thereon. Such verdict and judgment is sufficiently certain to enable the defendant to plead the former recovery in bar to another suit on the same cause of action.<sup>4</sup>

§ 218. Where a plaintiff's claim is divisible, part of it can be

<sup>1</sup> *Brockway v. Kinney*, 2 Johns. 210; *Phillips v. Berrick*, 16 Johns. 136; *Wickersham v. Whedon*, 33 Mo. 561; *Nave v. Wilson*, 33 Ind. 295; *Schmidt v. Zansdorf*, 30 Iowa, 498; *Bagot v. Williams*, 3 B. & C. 235; *Smith v. Whiting*, 11 Mass. 445; *Sheeks v. Dyer*, 39 Ind. 424; *Min. Co. v. Bul lion Co.*, 3 Sawyer, 634; *Whitchurst v. Rogers*, 38 Md. 503; *Ramsey v. Herndon*, 1 McL. 450; *Baker v. Stinchfield*, 57 Me. 363; *Burnett v. Smith*, 4 Gray, 50; *Baker v. Rand*,

13 Barb. 152; *McGiaty v. Herrick*, 5 Wend. 240; *Fisk v. Miller*, 20 Tex. 575; *Stafford v. Clark*, 3 Bing. 377; *Tate v. Hunter*, 3 Strobb. Eq. 136; *Beall v. Pearce*, 12 Md. 555; *Grant v. Ballou*, 14 Johns. 327; *Bancroft v. Winspear*, 44 Barb. 209; *Shaw v. Barnhardt*, 17 Ind. 183; *Goodrich v. Yale*, 8 Allen, 454; *Hobson v. Commonwealth*, 1 Duvall, 172.

<sup>2</sup> *Dutton v. Shaw*, 35 Mich. 431.

<sup>3</sup> *Bancroft v. Winspear*, 44 Barb. 209.

<sup>4</sup> *Streeks v. Dyer*, 39 Md. 424.

withdrawn and another action brought,<sup>1</sup> *but where it is indivisible*, the defendant cannot be vexed by having it split up into separate causes of action; and a judgment in a suit for part of a claim is a bar to another action for the remainder. Parol evidence is not admissible to show that matters *prima facie* within the estoppel of a judgment are exempt from its operation. When the cause of action upon which the judgment is rendered is entire, and therefore insusceptible of severance or apportionment, the estoppel extends to the whole, and it cannot be shown that any part was withheld from the decision of the court or the jury.<sup>2</sup> So inflexible is this rule, that even on the clearest proof that no evidence was given as to part of the demand in controversy,<sup>3</sup> or that it was overlooked by the jury in rendering their verdict, or that by inadvertence a judgment is taken for less than the party is entitled to.<sup>4</sup> Thus, if a plaintiff in an action to recover for loss of a house burned through carelessness of employees of a railroad company, deducts by mistake from his claim the amount of the insurance money which he has received, the judgment therein, if clearly pleaded, will bar a further recovery.<sup>5</sup> So where several actions for trover were brought for the taking of several articles of goods at the same time and by one act, it was held that a judgment for part of the articles was a bar to another action for the residue.<sup>6</sup> So where trover was brought for a horse, it was held that trespass for taking the same could not afterwards be maintained, for in trespass he might have recovered damages

<sup>1</sup> Green v. Clark, 12 N. Y. 343; O'Beirne v. Lloyd 43 N. Y. 278; People v. San Francisco, 27 Cal. 655; People v. Johnson, 38 N. Y. 63; Hadley v. Albany, 33 N. Y. 603.

<sup>2</sup> Corbet v. Evans, 25 Pa. St. 310; Logan v. Caffrey, 30 Pa. St. 96; Hess v. Heble, 4 S. & R. 246; Carwell v. Carrigues, 5 Pa. 152; Embury v. Connor, 3 N. Y. 371; Fish v. Foley, 4 Hill, 54; Duffy v. Lyttle, 5 Watts, 130; Farrington v. Payne, 15 Johns. 431; Guernsey v. Carver, 8 Wend. 493; Miller v. Covert, 1 Wend. 487; Baker v. Baker, 28 N. J. L. 1; Lucas v. Lecompte, 43 Ill. 303; Bancroft v.

Winspear, 44 Barb. 290.

<sup>3</sup> Miller v. Manice, 6 Hill, 121; Ramsey v. Herndon, 1 McL. 450; Neale v. Brown, 21 Ala. 483; Warren v. Cummings, 6 Cush. 103.

<sup>4</sup> Ewing v. McNary, 20 Ohio St. 315; Dodds v. Blackstock, 1 Pitts. 46; Brockway v. Kinney, 2 Johns. 210; Gray v. Gillian, 15 Ill. 454; Colburn v. Wentworth, 31 Barb. 381; Wainwright v. Rowland, 25 Mo. 53.

<sup>5</sup> Weber v. R. R. Co., 36 N. J. L. 213.

<sup>6</sup> Draper v. Stouvenel, 38 N. Y. 211; Farrington v. Payne, 15 Johns. 431; Bates v. Quattlebom, 2 N. & Mc. 205; O'Neal v. Brown, 21 Ala. 483.

for the force and violence for taking the horse, yet having elected to bring an action for the horse only, or for its value, he is bound by his election, and not allowed to carve two suits out of the same cause of action.<sup>1</sup> So, for an entire contract for the payment of money, or for the sale of goods, and an account for goods sold and delivered, consisting of several distinct items, delivered at different times, but all due, is an entire demand within the meaning of this principle, and a recovery for a part is a bar to any action for the residue.<sup>2</sup>

An account for a bill of goods purchased on one day is to be taken as one entire transaction in the absence of a contrary intention between the parties. The creditor cannot split it into several demands and actions, so as to give a justice of the peace jurisdiction, when the dealing was continuous, and nothing appears on the face of it, or in the account rendered, indicating that either party intended that each item should constitute a separate transaction.<sup>3</sup> Thus a recovery by an attorney in one of two suits brought on different portions of a bill for fees, for the purpose of bringing it within a justice's jurisdiction, will bar a recovery in the other.<sup>4</sup>

§ 219. When a party brings an action for a part only of an entire indivisible demand, and recovers judgment, he is estopped from subsequently bringing another action for another part of the same demand, and he cannot afterward avail himself of the *residue*, by way of set-off in an action against him by the opposite party.<sup>5</sup> Nor can a party, by assigning part of his claim to

<sup>1</sup> Hite v. Long, 6 Rand. 457; Brown v. Moran, 42 Me. 44; Waie v. Percival, 61 Me. 391.

<sup>2</sup> Bunnel v. Pinto, 2 Conn. 431; Guernsey v. Carver, 8 Wend. 492; Borngesser v. Harrison, 12 Wis. 544; Bornsey v. Wordsworth, 36 E. L. & Eq. 393; Smith v. Jones, 15 Johns. 229; Secor v. Sturgis, 16 N. Y. 548; Phinney v. Barnes, 17 Conn. 420; Avery v. Fitch, 4 Conn. 362; Girling v. Alders, 2 Neb. 617; Bagot v. Williams, 3 B. & C. 235; Nickerson v. Rockwell, 90 Ill. 460; Dulaney v. Payne, 101 Ill. 325; S. C., 40 Am. R.

205; Miller v. Covert, 1 Wend. 487; Stevens v. Lockwood, 13 Wend. 646; Bendernagle v. Cocks, 19 Wend. 206.

<sup>3</sup> Magruder v. Randolph, 77 N. C. 79.

<sup>4</sup> Lucas v. Le Compte, 42 Ill. 303.

<sup>5</sup> Miller v. Covert, 1 Wend. 487; Staples v. Goodrich, 21 Barb. 317; Waterbury v. Graham, 4 Sand. 215; Warren v. Comings, 6 Cush. 103; Marsh v. Pier, 4 Rawle, 273; Crosby v. Jerolman, 37 Ind. 277; Goodrich v. Yale, 8 Allen, 254; Marble v. Keyes, 8 Gray, 221; Stein v. Prairie Rose, 17 Ohio St. 471; Fish v. Folley, 6 Hill, 54; Webber v. R. R. Co., 36 N. J. L.

another, divide an entire cause of action, nor by any means sustain more than one suit on it, and if two suits be brought, a recovery in the first will bar the second;<sup>1</sup> as an entire cause of action cannot be divided, a judgment for or against the plaintiff for a portion will be as conclusive against his right to maintain another action for the balance, as though the judgment had embraced the whole.<sup>2</sup> The rule that prevents a party from splitting up his cause of action into small payments, takes away his remedy for the residue entirely, and having once claimed by action or defense a part of an entire subject matter, the law allows him no remedy for the other part, else there could be no end to litigation.<sup>3</sup> The rule that one cause of action cannot be split into several, is as applicable to actions *ex delicto* as to those *ex contractu*; a single act of trespass or conversion can be the found-

213; Carvil v. Garrigues, 5 Pa. St. 152; Bartels v. Schell, 16 Fed. R. 341.

<sup>1</sup> Ingraham v. Hall, 11 S. & R. 78; Van Zandt v. N. Y., 8 Bosw. 375; Milroy v. Mining Co., 43 Mich. 231.

<sup>2</sup> Secor v. Sturgis, 16 N. Y. 548; Simcs v. Zane, 24 Pa. St. 242; Stark v. Starr, 94 U. S. 477; Bunnell v. Pinto, 2 Conn. 431; Phinney v. Barnes, 17 Conn. 420; Footman v. Stetson, 32 Me. 17; Thompson v. McKay, 41 Cal. 221; Wetmore v. San Francisco, 44 Cal. 294; Wickersham v. Wheedon, 33 Mo. 561; Carvill v. Garrigues, 5 Pa. St. 152; Bender-nagle v. Cocks, 19 Wend. 207; Church v. Brown, 54 Barb. 191; Ins. Co. v. Cochran, 27 Ala. 283; Borgesser v. Harrison, 12 Wis. 544; Staples v. Goodrich, 21 Barb. 317; Waterbury v. Graham, 4 Sand. 215; Warren v. Comings, 6 Cush. 103; Smith v. Jones, 15 Johns. 229; Marsh v. Pier, 4 Rawle, 273; Crosby v. Jerolman, 37 Ind. 277; Camp v. Morgan, 21 Ill. 255; Stewart v. Todd, 9 Q. B. 767; Bagott v. Williams, 3 B. & C. 235; Sweeny v. Dougherty, 23 Iowa, 291; Lucas v. Lecompte, 42 Ill. 303; Cas-

sylberry v. Lecompte, 42 Ill. 303; Barber v. Lamb, 8 C. B. (N. S.) 95; Madden v. Smith, 28 Kas. 798; State v. Morrison, 60 Miss. 74; Pittman v. Chrisman, 59 Miss. 124; Hanes v. Cotton Press, 55 Miss. 654; Shattuck v. Mellor, 50 Miss. 391; Henderson v. Henderson, 3 Hare, 114; Mable v. Keyes, 9 Gray, 221; Badger v. Titcomb, 15 Pick. 409; Vauce v. Lancaster, 3 Hayw. 120; Avery v. Fitch, 4 Conn. 363; Willard v. Sperry, 16 Johns. 121; Cripp v. Talvande, 4 Me Cord, 20; Ingraham v. Hall, 11 S. & R. 78; Vines v. Arnold, 8 C. B. 632; Claves v. White, 83 Ill. 540; Campbell v. Hatchett, 55 Ala. 548; Baird v. U. S., 96 U. S. 432; Dulaney v. Payne, 101 Ill. 325; Casserly v. Forguer, 2 Ill. 170; Mathias v. Cook, 31 Ill. 87; R. R. Co. v. Nichols, 57 Ill. 454; Rosemuller v. Lecompt, 89 Ill. 213; Nickerson v. Rockwell, 90 Ill. 463; Sheppardson v. Cary, 29 Wis. 34; Covington v. Sargeant, 27 Ohio St 237.

<sup>3</sup> Baird v. U. S., 96 U. S. 430; Warren v. Comings, 6 Cush. 103; Simc v. Zane, 24 Pa. St. 242.

ation for but one suit for damages.<sup>1</sup> Thus, a judgment for the plaintiff against a railroad company, for damages, for the destruction of a building by fire communicated from a locomotive, is a bar to a subsequent action against the company for the destruction of other buildings by fire communicated from the building first destroyed, although the subsequent action is brought and prosecuted for the benefit of an insurance company which has paid to the plaintiff the amount of a policy of insurance upon such other buildings.<sup>2</sup>

§ 220. A party cannot divide and recover in parts, in different actions, a claim which in its legal nature is indivisible. The difficulty which is often experienced is increased rather than diminished, if courts are to rely on the doctrine of *stare decisis* in making their decisions. That a party shall not be allowed to split up an entire and indivisible claim and recover upon it in fragments in different actions, is itself palpably reasonable and is well enough settled. A party should not be vexed with a multitude of suits for one and the same cause of action. There can be no reason given why he should be, but sufficient and numerous reasons why he should not; *nemo debet bis vexari pro una et eadem causa*, and *interest rei publicæ ut sit finis litium*;<sup>3</sup> if a party divide a single and entire cause of action once, what limit is there, but the caprice and will of the party, to endless divisions? for what depends upon the mere caprice or will of an adversary, may be said to be without limit. To allow a single claim to be divided and recovered in parcels would be instituting an unreasonable doctrine that would necessarily lead to vexatious and endless litigation. To effectually prevent this, the law wisely holds that a party cannot recover in parts a claim which in its legal nature is indivisible. So, where a plaintiff brings an action of trespass or trover for one of several chattels carried off or converted at the same time, or for any other indivisible act or wrong, and recovers judgment, it will be effectual as an estoppel to any

<sup>1</sup> Lamb v. Walker, 3 Q. B. D. 389; White v. Mosely, 8 Pick. 356; Bran-  
nenburg v. R. R. Co, 13 Ind 100; Savage v. French, 13 Ill. App. 17; Johnson v. Smith, 8 Johns. 383.

<sup>2</sup> Trask v. R. R. Co., 2 Allen, 231.

<sup>3</sup> Lockyer v. Ferryman, L. R. 2 App. Cas. 519; Spang's Case, 5 Co. 61; Brennan v. Moyer, 98 Pa. St. 274; Ferrer's Case, 6 Co. 7; Davis v. Bledsoe, 69 Ala. 362.

future litigation by the same parties for the residue.<sup>1</sup> So a judgment, recovered against one of two wrong-doers, is an estoppel to an action by the plaintiff against both.<sup>2</sup> Thus where a bed and quilts were taken at the same time and by the same act; a recovery in trover for the quilts was held to be a bar to a recovery in trover for the bed. As the same rule is applicable in actions of contract, a vendor who sells goods at the same time and place to the same person, cannot multiply costs in bringing as many actions as there are parcels, but must include the whole in one action, even when they were delivered at different periods.<sup>3</sup> The amount due on a book account is regarded as one debt, although it may be composed of a hundred charges; it would be gross injustice to allow the creditor to divide it into as many actions or demands as there are items in the account; and it is for this reason that such claims are generally regarded as entire and indivisible.<sup>4</sup> So, where an indebtedness is contracted with a merchant, most of the articles furnished being purchased by the husband, and the account runs through several years, some of the items being such as the statutory estate of the wife is liable for, others for the expenses of the husband and his estate, and this account is kept as one continuous running account on the books of the merchant, such account constitutes but one debt, for the whole of which the husband is liable; and but one suit can be

<sup>1</sup> Farrington v. Payne, 15 Johns. 432; Phillips v. Berrick, 16 Johns. 136; Cunningham v. Harris, 5 Cal. 81; Cracraft v. Cochran, 16 Iowa, 300; Veghte v. Hoagland, 29 N. J. L. 125; Butler v. Wright, 2 Wend. 369; Bancroft v. Winspear, 44 Barb. 209; Fish v. Folley, 6 Hill, 54; Marble v. Keyes, 9 Gray, 221; Stein v. Prairie Rose, 17 Ohio S. 471; Erwin v. Lyon, 16 Ohio S. 539; Fowle v. New Haven, &c., 107 Mass. 499; Herriter v. Porter, 23 Cal. 385; Hopf v. Meyers, 42 Barb. 270; State v. Morrison, 60 Miss. 74.

<sup>2</sup> Bennett v. Hood, 1 Aller, 47; Herriter v. Porter, 23 Cal. 385.

<sup>3</sup> Coggins v. Bulwinkle, 1 E. D. Smith, 434; Stevens v. Lockwood, 13

Wehd. 644; Smith v. Jones, 15 Johns. 229; Trask v. R. R. Co., 2 Allen, 331; Connell v. Cook, 7 Cow. 310; Guernsey v. Carver, 8 Wend. 442; Draper v. Stouvenel, 38 N. Y. 219; Cracraft v. Cochran, 16 Iowa, 300; Farrington v. Payne, 15 Johns. 432; Phillips v. Berrick, 16 Johns. 136; Cunningham v. Harris, 5 Cal. 81; Miller v. Covert, 1 Wend. 487.

<sup>4</sup> Avey v. Fitch, 4 Conn. 362; Bendenagle v. Cocks, 19 Wend. 207; Guernsey v. Carver, 8 Wend. 492; Warren v. Comings, 6 Cush. 103; Sennar v. R. R., 26 Mo. 46; Brown v. King, 10 Mo. 57; Simes v. Zane, 24 Pa. St. 242; Colburn v. Woodworth, 31 Barb. 381; Lucas v. Le Compte, 42 Ill. 303.

maintained against him for its recovery.<sup>1</sup> So, an entire demand for goods sold at one time, although in different parcels or barrels,<sup>2</sup> or upon a contract for the payment of money in a gross sum and at one time, whether as rent or any other indivisible consideration,<sup>3</sup> cannot be apportioned or severed, and if once made the subject of a judicial decision, will be absolutely and forever extinguished, notwithstanding it can be shown by the clearest proof that part of the demand was withheld and that the judgment which was rendered was only for the residue of the amount in litigation.<sup>4</sup>

§ 221. This difficulty presents itself, and that is, to ascertain what is an entire demand; the rule is, that all acts of the same nature, performed at the same time, are regarded as one act in law, and cannot be made the subject of several and separate actions where they are continuous instead of being simultaneous; the same rule applies, unless it be shown by proof that they are distinct causes of action. Where goods are sold, services rendered, or money received, under such circumstances, that the different items while occurring at different times are but one transaction, the cause of action will be entire, and a recovery for any part will be conclusive against the right to sue for the balance.<sup>5</sup> So wages due for work and labor performed at different periods, under a general hiring or retainer, form but one demand, and cannot be severed by withdrawing the amount due for a particular month or week formally from the record in one suit, and making it the basis of another.<sup>6</sup> The cause of action

<sup>1</sup> Lee v. Tannenbaum, 62 Ala. 501.

<sup>2</sup> Smith v. Jones, 15 Johns. 229; Miller v. Covert, 1 Wend. 487.

<sup>3</sup> Willard v. Sperry, 16 Johns. 121; Warren v. Comings, 6 Cush. 103.

<sup>4</sup> Senner v. R. R. Co., 26 Mo. 26; Brown v. King, 10 Mo. 57; Logan v. Cafferty, 6 Mo. 196; Simms v. Zane, 24 Pa. St. 242; Colburn v. Woodworth, 31 Barb. 381; Corbet v. Evans, 25 Pa. St. 310; Town v. Smith, 14 Mich. 348; Mandeville v. Welch, 5 Wheat. 286; R. R. Co. v. Nichols, 57 Ill. 464; Willard v. Sperry, 16 Johns. 121; Sweeney v. Dougherty, 23 Iowa, 291; Flaherty

v. Taylor, 35 Mo. 441; Morgan v. Jacoby, 26 Mo. 27; Warren v. Comings, 6 Cush. 103; Walter v. Richardson, 11 Rich. 466; State v. Morrison, 60 Miss. 74; Smith v. Jones, 15 Johns. 229; Dunn v. Shaw, 35 Mich. 431.

<sup>5</sup> Guensey v. Carver, 8 Wend. 492; Stevens v. Lockwood, 13 Wend. 644; Bundernagle v. Cocks, 19 Wend. 207; Colvin v. Corwin, 15 Wend. 557; Jex v. Jacob, 7 Abb. N. C. 452; Avery v. Fitch, 4 Conn. 432; Bunnell v. Pinto, 2 Conn. 431.

<sup>6</sup> Booge v. R. R., 33 Mo. 212; Logan v. Caffrey, 30 Pa. St. 196;

is not the less entire, because the services were not continuous but if there had been different hirings each one might have been a cause of action: so, where a man paid by the day or week returns to his employer after a short absence, it will not constitute a new contract, nor entitle him to bring separate actions for that which, although performed at different periods, is, in the eye of the law, one consideration. But where the consideration is distinct in nature, place, or time, and unless the circumstances surrounding the transactions are such as to indicate that they are to be regarded as a whole and should be treated as an entirety, the *onus* is upon him who alleges the fact, and unless proven to be so, it is not so considered.<sup>1</sup> Where a person is employed for a year, at a stipulated sum per month, but is discharged before the expiration of his term, and thereupon sues and obtains judgment for the amount due up to the time of such discharge, he is not thereby estopped from instituting proceedings to recover the balance due him for the remaining portion of the year.<sup>2</sup>

§ 222. The doctrine is settled beyond controversy that a judgment concludes the right of parties in respect to the cause of action stated in the pleadings in which it is rendered, whether the suit embraces the whole or only part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim, ensuing either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of the same claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in other suits.<sup>3</sup>

Milroy v. Mining Co., 43 Mich. 231;  
 Pitman v. Chrisman, 59 Miss. 124.

<sup>1</sup> Secor v. Sturges, 16 N. Y. 548;  
 Church v. Brown, 54 Barb. 191; State  
 v. Morrison, 60 Miss. 74; Logan v.  
 Caffrey, 30 Pa. St. 196; Hess v.  
 Heeble, 6 S. & R. 57; Carvill v. Gar-  
 rigues, 5 Pa. St. 152; Miller v. Manice,  
 6 Hill, 122.

<sup>2</sup> Blun v. Holitzer, 53 Ga. 82.

<sup>3</sup> Veghte v. Hoagland, 29 N. J. L.  
 125; Bates v. Quattlebom, 2 N. & Mc.

205; Felter v. Beale, 1 Salk. 11; Buck-  
 land v. Johnson, 15 C. B. 145; State  
 v. Morrison, 60 Miss. 74; Whitney v.  
 Clarendon, 18 Vt. 252; Carpenter v.  
 Sheldon, 4 N. Y. 579; Hodsall v.  
 Stallebrass, 11 A. & E. 301; Cook v.  
 Cook, 2 Brev. 349; Smith v. Way, 1  
 Allen, 472; Towle v. N. H. & C. Co.  
 107 Mass. 352; Smith v. R. W. Co.  
 6 U. C. C. P. 156; Clegg v. Dear-  
 den, 12 Q. B. 576; Thompson v. Ro-  
 gers, 2 Brev. 410; Manning v. Eastern

§ 223. Any sum accrued and payable at the time an action is commenced on a single covenant, and not included in the judgment, cannot be recovered in another action, even though brought previously. Thus, where a suit for several months' rent was pending, another suit for an additional month's rent, due at the time of the bringing of the former suit, was brought in another court, and judgment taken. Both suits were general assumpsit for use and occupation. The judgment in the second suit is a bar to the first suit, and the omission to plead the first suit in abatement of the second is not a waiver of the right to plead the judgment in bar of the first suit.<sup>1</sup> So where a lease for three years reserves an annual rent of \$500, but stipulates that it is payable in two installments of \$750 each, at the end of the first and second years, the lessor cannot maintain a statutory attachment on the crop for \$500 and an ordinary common law action for the residue of one of the installments, since this would be splitting up an entire indivisible cause of action.<sup>2</sup> So a party who has paid a judgment and costs before its reversal, if he seeks to recover back the same, cannot split his demand and recover the damages paid in one action and the costs in another; and, after suit for the entire demand, the defendant cannot, by any act of his, compel the plaintiff to recover the costs in one suit and the damages in another.<sup>3</sup> Thus, A., who was employed by the trustees of a church to perform certain services for one year, at a fixed compensation, having performed such services for that year, afterwards, at the request of the priest connected with the church, and

&c. Co., 17 M. & W. 237; *Stuyvesant v. Mayor*, 11 Paige, 414; *Goodrich v. Yale*, 97 Mass. 15; *Chinn v. Hamilton*, Hemp 438; *Dalton v. Bentley*, 15 Ill. 420; *O'Beirne v. Lloyd*, 43 N. Y. 248; *Warren v. Comings*, 6 Cush 103; *Fish v. Folley*, 6 Hill, 54; *Bancroft v. Winspear*, 44 Barb 209; *Bendernagle v. Cocks*, 19 Wend. 207; *Hopff v. Meyers*, 42 Barb. 270; *Secor v. Sturgess*, 16 N. Y. 548; *Berringer v. Payne*, 68 Ala. 154; *Memmer v. Carey*, 30 Minn. 458; *Jaw v. McDonald*, 62 How. Pr. 340; *Am. Co. v. Thornton*, 28 Minn.

418; *Clements' Appeal*, 49 Conn. 520; *Ware v. Percival*, 61 Me. 391; *Morey v. King*, 51 Vt. 383; *Milroy v. Mining Co.*, 43 Mich. 281; *Manning v. Irish*, 47 Iowa, 650; *Strauss v. Meertief*, 62 Ala. 299; *Beck v. Devereux*, 9 Neb. 109; *Jex v. Jacob*, 7 Abb. N. Cas. 452; *Burritt v. Belfy*, 47 Conn. 323; S. C., 36 Am. R 79; *Rosenmuller v. Lampe*, 89 Ill. 212.

<sup>1</sup> *Burritt v. Belfy*, 47 Conn. 323; S. C., 36 Am. Rep. 79.

<sup>2</sup> *Campbell v. Hatchett*, 55 Ala. 548.

<sup>3</sup> *Clayes v. White*, 83 Ill. 540.

upon the promise of the same compensation, performed the same services for another year. He then brought suit against the trustees for a balance claimed to be due him for the first year; and, having recovered judgment therefor, brought a second suit for a balance claimed to be due for the second year. Held, that both claims must be considered as growing out of the first contract, and, both being due when the first suit was brought, the judgment therein constituted a bar to the second suit.<sup>1</sup> In a late case, in the same State, that court says, where a note is given, payable in one year, with interest payable semi-annually, a suit brought two years thereafter, and a recovery of the interest, is no bar to a subsequent action on the note to recover the principal. In such case, the promise to pay interest is a distinct cause of action from the promise to pay the principal. Each promise constitutes a distinct cause of action.<sup>2</sup> How this principle accords with the following rule laid down by the same court is difficult to ascertain. "*Held*, that both claims must be considered as growing out of the first contract, and, both being due when the first suit was brought, the judgment therein constituted a bar to the second suit."<sup>3</sup> The claim for interest is one peculiarly arising out of the original contract; without a principal sum there would be no claim for interest, one depends on the other, and both are the result of the one contract of loan. It is barely possible that the doctrine that there must be an end to litigation will be overruled and in time become obsolete. It is a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court either by the pleadings, or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first should fail. There would be no end to litigation if such practice were permissible.<sup>4</sup> Thus, if there are several payments

<sup>1</sup> *Rosenmueller v. Lampe*, 89 Ill. 212.

<sup>2</sup> *Dulaney v. Payne*, 101 Ill. 325; 60 C., 40 Am. R. 205; overruling *Secor v. Sturgis*, 16 N. Y. 548; *Bank v.*

*Adams*, 1 Allen, 28; *Sparhawk v. Willis*, 6 Gray, 163.

<sup>3</sup> *Rosenmueller v. Lampe*, 89 Ill. 212.

<sup>4</sup> *Stark v. Starr*, 94 U. S. 585; *Brant v. Coal Co.*, 93 U. S. 336.

due under the same contract at the time suit is brought to recover one installment, a judgment for the amount of the latter will be held to be in satisfaction of the whole, as all the sums being due could have been included in the action.<sup>1</sup>

§ 224. The true distinction between demands or rights of action are several and distinct, in that the former arises out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps as safe and simple a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one<sup>2</sup> however numerous the items of wrong or damage may be, in respect to contracts, express or implied, each contract affords one, and only one, cause of action. The case of a contract containing several stipulations to be performed at different times is no exception; although an action may be maintained upon each stipulation, as it is broken before the time for the performance of the others, the ground of action is in the stipulation, which is in the nature of a several contract; where there is an account for goods and labor performed, where money has been lent to or paid for a party at different times, or several items spring in any way from the same contract, whether only one or separate rights of action exist, will, in each case, depend upon whether each case is covered by one or separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work, or advance money; and, usually, in the case of a running account, it may be fairly implied that it is, in pursuance of an agreement, that an account may be opened and continued, either for a definite period or at the pleasure of both the parties. But there must be either an express contract, or the circumstances must be such as to raise an implied contract embracing all the items, to make them, when they arise at different times, a single or entire demand, or cause of action.

<sup>1</sup> Jarrett v. Self, 90 N. C. 478.

v. Simons, 7 Mo. App. 376; Porter v.

<sup>2</sup> Gas Co. v. Howell, 92 Ill. 19;  
Clarke v. Yorke, 52 L. J. Ch. 32, Kerr

Cobb, 22 Hun, 278; Geiser Co. v. Farmer, 27 Minn. 428

§ 225. When, however, simultaneous or successive contracts are so far different that they cannot be united, or described as constituting a single consideration in pleading, the contract will not be entire unless made so expressly; and a party who lends money and sells goods, at the same time and place, to another, may either bring a joint or separate action, as he may see fit. Distinct contracts of sale constitute distinct causes of action, unless by agreement or by inference from circumstances they are blended so as to constitute one entire demand.<sup>1</sup> When several promises or covenants are contained in the same instrument, or where a covenant is made to pay money from time to time, by installments, a separate action may be brought for each installment, as it falls due, on the several covenants when broken, before the period fixed for the payment or performance of the others.<sup>2</sup> And as the defendant ought to have as much latitude as the plaintiff, he will not be estopped from taking advantage of a defense to an action brought under these circumstances, by having neglected to plead in a former action, when it would have been equally available.<sup>3</sup> And unless the stipulations in an instrument are essentially distinct, after the occurrence of several breaches, they must be made the subject of one action.<sup>4</sup> In one case where the defendants removed a pauper from the town of H—— to M—— and left him there. He had no known settlement in the State, and M—— had to assume charge of him; and the defendants brought him there for the purpose of throwing the burden of his support upon that town. M—— sued them for damages, and recovered the amount expended in his support up to the time of trial. They then requested the defendants to remove the pauper, but they refused to do so. The pauper continued a charge upon the town, and M—— afterwards sued again for the damages that had accrued since the former judgment, alleging the original bringing of the pauper into the town by the defendants, their leaving him there, and their refusal to remove

<sup>1</sup> American Buttonhole, etc. Co. v. Thornton, 28 Minn. 418.

<sup>2</sup> Secor v. Sturgis, 22 N. Y. 548; Perkins v. Hart, 11 Wheat. 237; Wolf v. Wilton, 30 Pa. St. 202; Mills v. Garrison, 3 Abb. App. 297; Dulaney

v. Payne, 101 Ill. 325; S. C., 40 Am. R. 205; Am. Co. v. Thornton, 28 Minn. 418; Memmer v. Carey, 30 Minn. 458.

<sup>3</sup> Hughes v. Alexander, 5 Duer, 488.

<sup>4</sup> Hopf v. Myers, 42 Barb. 270.

him. The former recovery was held a bar to the second action.<sup>1</sup> The case is not, like that of a continuance of a nuisance a constantly renewed cause of action. The whole injury was, in contemplation of law, done by the first act of bringing the pauper into the town. Though there might be difficulty in ascertaining the exact damage which might result, inasmuch as it depended upon contingencies, yet it was no more difficult than in many other cases of future and consequential damage, which, resulting from one wrongful act, can be made the ground of but one action. If a plaintiff recover compensation for part of a cause of action, it is a satisfaction for the whole.

§ 226. Judgments, like all contracts, are vitiated by fraud. Thus where an insurance agent gave bond to his principal, conditioned to pay over and account for all moneys received by him as such, judgment having been recovered by them on this bond, for money not accounted for and paid over, a *scire facias* was issued, assigning as a breach that the obligor had received a further sum of money, for which he failed to account, and the receipt of which he fraudulently concealed; and on pleading the former judgment as an estoppel to the subsequent action on the same bond, the court held that the fraudulent concealment was sufficient reason for not including the sum in the original pleading, and rendered judgment in the subsequent action for the amount proved to have been concealed.<sup>2</sup> A conditional judgment for the full amount of a promissory note, rendered in a suit to foreclose a mortgage given to secure the note, is no bar to an action for the recovery of money received from the debtor by an attorney, to be applied in part payment of the note, which he was then holding for collection, and on which he neglected to apply it.<sup>3</sup> So, a suit by an administrator *cum testamento annexo* against an executor who had been removed from his office, for the assets remaining in his hands, is a bar to another action for the recovery of funds which have been received by the executor before the institution of the first suit, but are not included in the judgment, in consequence of a mistaken impression that they were not due

<sup>1</sup> *Marlborough v. Sisson*, 31 Conn. 332.      *Nettleton v. Beach*, 107 Mass. 499; *Spencer v. Vigneux*, 20 Cal. 442.

<sup>2</sup> *Johnson v. Ins. Co.*, 12 Mich. 216;      <sup>3</sup> *Nettleton v. Beach*, 107 Mass. 499.

at the time it was rendered.<sup>1</sup> But if the defendant fails truthfully to account for the assets in his hands, it is an indicia of fraud, and the former suit would not be a bar on account of fraud; but if it is a mistake of the plaintiff, without concealment and falsehood on part of the defendant, the former action can be pleaded as an estoppel.<sup>2</sup> And in a case where the plaintiff recovered a judgment on a bond, whereby the defendant was bound to the plaintiff to abstain from all injuries to the plaintiff's property, was held a bar to a subsequent action of tort by the same plaintiff against the same defendant, for particular injuries committed to the property, between the time of giving the bond and the beginning of the former action.<sup>3</sup>

§ 227. When, however, several causes of action are set forth in the complaint, the law presumes that the judgment covers the whole; but this presumption may be rebutted by clear proof that it extends to only one of the counts, or part of them.<sup>4</sup> So, a presumption that a judgment obtained on a contract for the payment of money in installments, includes the whole amount of the debt, may be rebutted by parol evidence that a portion of the installments were not due, and that the action and judgment could not include them at the time of its rendition, and a judgment recovered for that portion which could not have been included in the former.<sup>5</sup> A plea of former recovery in trover may be defeated by proving that the property for which the subsequent action is brought was not converted until after the first litigation was decided; in cases of this kind judgments could not have been rendered on demands which did not accrue prior to the rendition of the judgment in the former action; and in a late decision in Massachusetts, it was held that a judgment in an action of tort, in the nature of an action of trespass *quare*

<sup>1</sup> Pinney v. Barnes, 17 Conn. 420.

<sup>2</sup> State v. Morton, 18 Mo. 53.

<sup>3</sup> Goodrich v. Yale, 97 Mass. 15; Bettys v. R. R. Co., 43 Iowa, 602.

<sup>4</sup> Goddard v. Selden, 7 Conn. 521; Brown v. King, 10 Mo. 56; Smith v. Talbot, 11 Ark. 666; Webster v. Lee, 5 Mass. 334; Badger v. Titcomb, 15 Pick. 409; Croft v. Steel, 6 Watts,

373; Benket v. State, 3 Ind. 248; Carter v. Hanna, 2 Ind. 45; Parnell v. Hahn, 61 Cal. 131.

<sup>5</sup> Wilson v. Wilson, 9 S. & R. 529; Steiner v. Gower, 3 W. & S. 43; Kane v. Fisher, 2 Watts, 253; Armsfield v. Meech, 31 Mich. 316; Doty v. Brown, 4 N. Y. 71; Marcellus v. Countryman, 65 Barb. 201.

*clausum*, was not conclusive in another action between the same parties, upon the same close, if there was nothing to show that the two trespasses were identical,<sup>1</sup> and that a judgment in an action for the conversion of a tree was not conclusive evidence of the title in a suit to recover the premises on which the tree stood, although accompanied by proof that the only question litigated in the former suit was the question of title.<sup>2</sup> In a still later case the same court said: "The finding and award of referee in an action of trespass brought by A. against B. for cutting and carrying away wood growing upon the premises, is admissible at the trial of a writ of entry to recover the same premises, instituted by plaintiff against defendant, it being shown that the question of title was tried and passed upon in the former action, and that parol evidence was admissible to show that it was tried and passed upon. The admissibility of the record of the former judgment between the same parties depends upon the question whether the issue upon which the present case turns was in fact litigated and decided in the former suit. The trial of an action of trespass may turn upon the question of title, and if that question is put in issue, tried and passed upon by the jury, or court or a referee, the verdict or finding and judgment following it are competent evidence of that fact in a subsequent writ of entry between the same parties, even if it does not operate as a conclusive estoppel.<sup>3</sup> The pleadings in the former suit between the parties alone do not show upon what ground the judgment was based.<sup>4</sup> But to a complaint to recover the possession of real estate and to quiet the title of the plaintiff, and answer alleging that in a former suit by the plaintiff against the defendant, the defendant was charged with having committed a trespass upon the real estate in question, by cutting and carrying away timber trees growing thereon, and that after issues were joined, the case was tried, and the only question litigated in the trial was the title to the real estate, and that a finding and judgment

<sup>1</sup> *Morse v. Marshall*, 97 Mass. 519.

<sup>2</sup> *Johnson v. Morse*, 11 Allen, 540.

<sup>3</sup> *Eastman v. Cooper*, 15 Pick. 276;  
*Dutton v. Woodman*, 9 Cush. 255;

*Sawyer v. Woodbury*, 7 Gray, 499;

*Burden v. Shannon*, 99 Mass. 200.

<sup>4</sup> *Evans v. Clapp*, 123 Mass. 165;  
*White v. Chase*, 128 Mass. 153; S. C.  
21 Abl. L. J. 135.

was rendered therein in favor of the defendant,—Held a good answer.<sup>1</sup>

§ 228. It may be shown that matters which might have been litigated and included in a former judgment, were excluded from its operation by evidence that not only the particular cause of action embraced in the second action was withdrawn from the record, but that the evidence adduced upon the trial of the former action upon the demands submitted to the jury, related to a particular or specific demand entirely different from that upon which the subsequent action is founded.<sup>2</sup> Thus two bills of goods do not constitute one demand when one may become the subject of suit before the other becomes due, or when the remedy for one is barred before the time is expired for the other.<sup>3</sup> So on a general verdict on a complaint embracing a half a dozen counts, that the evidence was given on one count only, and that there was none on the other, as if an action was brought upon a note, and for goods sold and delivered, and for money loaned, it may be shown that the verdict was rendered on the note and that the other two counts were withdrawn; or that no testimony was adduced to sustain the other two counts; or that a judgment on the common counts for work and labor which is a *prima facie* conclusion that it includes all the work and labor performed by the plaintiff prior to the commencement of the action, yet in a subsequent action for work and labor it may be shown that it is different from that which formed the subject of the former action. So a judgment in an action for goods sold and delivered will not be available in another action of a like nature for goods sold prior to the commencement of the former action, though the plaintiff might have included it in his first suit.<sup>4</sup> But a judgment in favor of a vendor for the price of part only of the goods sold is a bar to a subsequent suit for non-delivery.<sup>5</sup>

<sup>1</sup> Campbell v. Cross, 39 Ind. 155.

<sup>2</sup> Abdill v. Abdill, 33 Ind. 460; Bynkert v. State, 6 Ind. 248; Sweet v. Tuttle, 14 N. Y. 465; McCreary v. Casey, 45 Cal. 128; Cook v. Burnley, 45 Tex. 97; Evans v. Clapp, 123 Mass. 165; White v. Chase, 128 Mass. 153; Paine v. Ins. Co., 12 R. I. 440.

<sup>3</sup> Stickel v. Steel, 41 Mich. 350.

<sup>4</sup> Sweet v. Tuttle, 14 N. Y. 465; Wright v. Butler, 20 Johns. 367; Banker v. State, 6 Ind. 248; Phillips v. Berick, 16 Johns. 136; Brony v. King, 10 Mo. 57; Bridge v. Gray, 14 Pick. 556; Preston v. Peek, 1 E. B. & E. 336.

<sup>5</sup> Lawrence v. Hunt, 10 Wend. 80; Stevens v. Teft, 8 Gray, 419; Sawyer

§ 229. A party cannot sustain a suit on a ground which would have constituted a sufficient defense to a former action against him. He must set up and plead all matters which are strictly matters of defense, as he cannot afterwards re-litigate those same matters in a new action.<sup>1</sup> So, where a party has a defense which he neglects to make, he is estopped, after the rendition of judgment from seeking relief, in a court of equity. But where a defendant is ignorant of the facts which constitute his defense at law pending the suit, or the defense is not available at law, the

v. Woodbury, 7 Gray, 501; Eastman v. Cooper, 15 Pick. 276; Burlen v. Shannon, 97 Mass. 200; Smith v. Kelly, 2 Hall, 217

<sup>1</sup> Davis v. Talcott, 13 N. Y. 184; Hackworth v. Zollars, 30 Iowa, 432; Ewing v. McNary, 20 Ohio S. 316; Lewis v. Armstrong, 45 Ga. 131; Cadmus v. Jackson, 52 Pa. St. 295; Mayor v. Ab Loy, 32 Cal. 477; Luttrell v. Fisher, 11 Heisk 101; Gold v. Fite, 58 Tenn. 237; Turney v. Dibiell, 59 Tenn. 235; Mayor v. Foley, 40 Cal. 281; Bank v. Stevens, 46 Iowa, 429; Brown v. McKinnally, 1 Esp. 279; Hopkins v. Lee, 6 Wheat. 109; Doak v. Wiswell, 33 Me. 355; Flint v. Dodge, 10 Allen, 128; Kirkham v. Brown, 4 Humph. 174; Snowden v. Davis, 1 Taunt. 339; Knibbs v. Hall, 1 Esp. 84; Edgell v. Sigerson, 26 Mo. 583; Poorman v. Mitchell, 48 Mo. 45; Baker v. Rand, 13 Barb. 161; Birkhead v. Brown, 5 Sand 134; Lamprey v. Nudd, 29 N. H. 299; Wainwright v. Rowland, 25 Mo. 53; Dalton v. Bentley, 15 Ill. 420; Pierce v. Kneeland, 9 Wis. 24; Bowman v. McKleroy, 15 La. Ann. 663; Barnes v. Cunningham, 9 Rich. Eq. 475; Moody v. Harper, 38 Miss. 599; Tallman v. McCarty, 11 Wis. 406; Finney v. Boyd, 26 Wis. 370; Dudley v. Stiles, 33 Wis. 372; Loring v. Marshall, 17 Mass. 394; Driscoll v. Damp, 17 Wis. 419; Smith v. Lowry, 1 Johns. Ch. 320; Morenhout

v. Higuera, 32 Cal. 289; Swenson v. Cresop, 28 Ohio S. 668; Patrick v. Roach, 21 Tex. 251; Loomis v. Pulver, 9 Johns. 244; White v. Ward, 2 Johns 232; Corey v. Gale, 13 Vt. 639; Battey v. Button, 13 Johns. 187; Walker v. Ames, 2 Cow. 428; Dey v. Dox, 9 Wend. 129; Kist v. Atkinson, 2 Camp. 63; Bilbie v. Lumley, 2 East, 469; Gower v. Popkin, 2 Stark. 85; Brisbane v. Dacres, 5 Taunt. 144; Bull v. Rowe, 13 S. C., 355; Clinton v. Strong, 9 Johns. 370; Mowatt v. Wright, 1 Wend. 355; Clark v. Dutcher, 9 Cow. 674; Supervisors v. Briggs, 2 Denio, 128; Carter v. Canterbury, 3 Conn. 456; Homer v. Fish, 1 Pick. 435; Whitcomb v. Williams, 4 Pick. 238; Holden v. Curtis, 2 N. H. 61; Wright v. Leclaire, 3 Iowa, 221; Koon v. Ivey, 8 Rich. L. 37; Flint v. Bodge, 10 Allen, 128; Fonda v. Denton, 13 La. Ann. 343; Merriam v. Woodcock, 104 Mass. 326; Jackson v. Patrick, 10 S. C. 19; Mariot v. Hampton, 7 T. R. 269; Le Guen v. Gouverneur, 1 Johns. 436; Embery v. Connor, 3 N. Y. 5; Voorhees v. Bank, 10 Pet. 449; Denne v. Knott, 7 M. & W. 143; Lane v. Chapman, 11 A. & E. 966; Wilson v. Ray, 10 A. & E. 82; Belcher v. Mills, 2 C. M. & R. 150; Le Chevalier v. Lynch, 1 Doug. 70; Reynolds v. Weed, 4 Bing. N. C. 694; Phillips v. Hunter, 2 Il. Bl. 402; Philpot v. Aslett, 1 C. M. & R. 85.

case forms an exception to the rule, that equity will not interpose to relieve against a judgment at law; but if he be guilty of any negligence, courts of equity cannot interfere. So, a physician against whom judgment has been rendered for malpractice cannot recover in action for professional services, in the course of which the malpractice is alleged to have occurred, while a judgment for his services will be a bar to a subsequent action for malpractice. Thus, where in a justice's court plaintiff brought an action to recover six dollars for professional services, the defendant confessed judgment for the amount, and then brought an action in another court claiming damages for an alleged malpractice occurring during the time for which the services were rendered on which judgment had been confessed; the court there held, that the judgment in the justice's court in favor of the surgeon for professional services was a bar to any action by the defendant against him for malpractice in performing such services where the judgment was rendered by confession without a trial, and although the suit was brought by the surgeon and judgment was rendered prior to bringing the action for malpractice,<sup>1</sup> on the ground that the judgment in the former actions being presumptive if not conclusive proof that there is no cause of action or foundation for the subsequent suit, and that a recovery could not have been had without establishing a performance of the contract. So where one is induced to indorse a promissory note by the statements of the payee that it was a mere matter of form, and that he would not be troubled about it, and afterwards suit is brought and he makes no defense, and judgment is rendered, he is estopped from claiming that the judgment is not binding upon him. But where, after the judgment, statements to a similar effect were made under such circumstances as to justify the indorser in believing and acting upon them, and in supposing he was not liable, and he was thereby induced to abstain from securing himself, when he might easily have done so, until the maker was insolvent, and an execution

<sup>1</sup> Davis v. Talcott, 12 N. Y. 184; Newton v. Hook, 48 N. Y. 676; White v. Merritt, 7 N. Y. 352; Bel- Brown v. Mayor, 66 N. Y. 385; Guest  
linger v. Craigie, 31 Barb. 534; v. Brooklyn, 79 N. Y. 624; Ackley  
Edwards v. Stewart, 15 Barb. 67; v. Westervelt, 86 N. Y. 448.  
Gates v. Preston, 41 N. Y. 113.

was then levied upon his property, it was held that he was not bound by the judgment, and that he was entitled to a perpetual injunction.<sup>1</sup> So, a plaintiff who has declared specially on a contract will be entitled to rely on the judgment in his favor as conclusive that the contract was in force during the period over which the declaration extended. So, where a plaintiff had sued a defendant on the same contract of lease as that set forth in the declaration, and recovered judgment against him, it was a good answer to a plea that the lease had been amended before the breach for which the former action was brought.<sup>2</sup> The rule that the estoppel of a judgment must be certain, and will not be extended by implication to matters not embraced in its terms, does not hold good where the implication is irresistible, or so far aided by extrinsic evidence as to leave no room for doubt.

§ 230. A judgment is conclusive not only to the point which it professes to decide, but of matters which it was necessary to decide, and which were actually determined as to the ground work of the decision.<sup>3</sup> So, where an order reciting that John and William were the lawful children of their parents, and that their last settlement was in the parish of Hartington, was held conclusive of the settlement of the parents as well as of the children, because the one was involved in the other, and appeared from the record, though not set forth in it, for the reason that it partook of the nature of a proceeding *in rem*.<sup>4</sup>

An order of removal of a pauper unappealed from or affirmed on appeal, is conclusive upon the township charged thereby, and no other removal of such pauper can be made, except to subsequently acquired settlement. That such an order unappealed from is conclusive upon the parties to it is conceded to be beyond

<sup>1</sup> Roberts v. Miles, 12 Mich. 297; White v. Merritt, 7 N. Y. 352.

<sup>2</sup> Faust v. Ramsey, 7 Ohio S. 457; Gardner v. Buckbee, 3 Cowen, 124; Love v. Waltz, 7 Cal. 250; Kelsey v. Ward, 38 N. Y. 83.

<sup>3</sup> De St. Romes v. C. C. & N. Co., 24 La. Ann. 331; Wittick v. Traunn, 25 Ala. 317; Heath v. Frackelton, 20 Wis. 320; Hunter v. Davis, 19 Ga. 413; Glass v. Wheeler, 24 La. Ann.

397; Jacobson v. Miller, 41 Mich. 90; Allison's Case, L. R. 9 Ch. 23; S. C., 43 L. J. C. 11; Watkins v. Gray, 5 Mo. App. 591.

<sup>4</sup> Davidson v. Shipman, 6 Ala. 27; Chamberlain v. Galliard, 26 Ala. 504; The Queen v. Hartington, 4 E. & B. 780; Regina v. Haughton, 18 E. L. & Eq. 287; Tuska v. O'Brien, 68 N. Y. 449; Cabot v. Wahington, 41 Vt. 168.

dispute. But that it shall be so upon the township charged against its rights to remove the subject of it to a subsequently discovered legal settlement in some other municipality, not a party to such *order*; such order, unappealed from or confirmed upon appeal, not only binds the immediate parties to the litigation as to each other, but is conclusive as to all the facts found or necessary to have been found in support of such judgment, upon all parties subject to the jurisdiction of the court rendering the judgment.<sup>1</sup> It has, however, been held that a judgment in an action by one town against another for supplies furnished to a pauper claimed to belong to the defendant town, in which it is determined that the pauper is a settled inhabitant of that town, is not a judgment *in rem*, and is binding only on the parties to the suit and their privies.<sup>2</sup>

§ 231. A judgment in favor of a servant who is suing for wages, or a physician who has brought an action for his fees, is in form merely that the plaintiff is entitled to the compensation which he claims. But it also conclusively establishes that the plaintiff did all it was necessary for him to do in order to recover, and estops the defendant from denying that such was the case, or recovering damages for an alleged want of care or skill in the course of business in which the plaintiff was employed.<sup>3</sup> While

<sup>1</sup> *Rex v. Silchester*, Bur. Set. Cas. 551; *Rex v. Hincksworth*, Cald. 42; *Rex v. Southowram*, 1 T. R. 353; *Rex v. Kenilworth*, 2 T. R. 598; *Rex v. St. Mary's*, 6 T. R. 615; *Rex v. Woodchester*, 2 Str. 1172; *Rex v. Rudgeley*, 8 T. R. 620; *Regina v. Holsworth*, 1 Ad. & E. 221; *Regina v. Wye*, 7 Ad. & F. 766; *Southfield v. Bloomingrove*, 2 Johns. 105. In *Regina v. Wye*, Lord Denman assigns to it the form of a judgment *in rem* binding upon all the world. *Little Falls v. Bernards*, 44 N. J. L. 623.

<sup>2</sup> *Bethlehem v. Watertown*, 47 Conn. 237.

<sup>3</sup> *Smith v. Hemstreet*, 54 N. Y. 644; *Brown v. Mayor*, 66 N. Y. 385;

*Newton v. Hook*, 48 N. Y. 676; *Jarvis v. Driggs*, 69 N. Y. 143; *Blair v. Bartlett*, 75 N. Y. 150; *Lathrop v. Knapp*, 37 Wis. 307; *White v. Merritt*, 7 N. Y. 352; *Davis v. Talcott*, 12 N. Y. 18; *Caylus v. R. R.*, 76 N. Y. 609; *Howell v. Earp*, 21 Hun, 393; *Arnold v. Kyle*, 8 Daxt. 319; *Dunham v. Bower*, 77 N. Y. 76; *Davis v. Bedsole*, 69 Ala. 362; *Nemetty v. Naylor*, 63 How. Pr. 387; *Blair v. Bartlett*, 75 N. Y. 150; *Gates v. Preston*, 41 N. Y. 113; *Edward v. Stewart*, 15 Barb. 66; *Ballinger v. Craigue*, 31 Barb. 534; *Howell v. Goodrich*, 69 Ill. 566; *Collins v. Bennett*, 46 N. Y. 400; *Merriam v. Woodcock*, 104 Mass. 326; *Hanley v. Foley*, 18 B. Mon. 519; *Connor v. Varney*.

an estoppel cannot be drawn from a judgment by arguing from it to anything that lies beyond, it is often necessary to reason back to the foundation on which it rests, on the principle that when a conclusion is indisputable and could only have been drawn from certain premises, the premises will be equally indisputable with the conclusion. A former judgment is conclusive not only of the thing directly decided, but of every fact which was essential to the adjudication. A judgment that a plaintiff is entitled to compensation for an alleged wrong, is not merely a judgment that so much is due, but it is also a judgment in favor of the right or title set forth by the plaintiff, and against that opposed to it or relied upon by the defendant; and although this may be in one sense a mere inference or presumption, still it is a necessary inference which cannot be controverted.<sup>1</sup> So, where the owner of mules, transported by railroad, being sued for the carrier's charges before a justice of the peace by an assignee of the claim, set up in defense that one of the mules was injured through the negligence of the carrier, and sought to recoup his damages, but the justice rendered judgment against him for the full amount of the charges, the judgment was a bar to a subsequent action by him against the carrier to recover such damages.<sup>2</sup>

§ 232. The Supreme Court of Wisconsin, in a late case,<sup>3</sup> while controverting the doctrine of *Gates v. Preston*, said: "Where, after an action was commenced in the Circuit Court against a physician for malpractice in attendance upon a certain case, the physician instituted a suit in the court of a justice of the peace for the value of his services for such attendance, in which suit the defendant therein interposed a general denial as to the value

10 Gray, 231; *King v. Chase*, 15 N.H. 9; *Stevens v. Miller*, 13 Gray, 233; *Haynes v. Ordway*, 19 A. L. J. 180.

<sup>1</sup> *Tuska v. O'Brien*, 68 N. Y. 499; *Kane v. Fisher*, 2 Watts, 246; *Heath v. Flackelton*, 20 Wis. 320; *State v. Beloit*, 20 Wis. 79; *Allis v. Davidson*, 23 Minn. 442; *Bank v. R. R. Co.*, 69 Ala. 305; *Cranford v. Simonson*, 7 Port. 110; *Trustees v. Keller*, 1 Ala. 406; *Herndon v. Gi-*

*vens*, 16 Ala. 261; *Mervine v. Parker*, 18 Ala. 241; *Wittick v. Traum*, 25 Ala. 317; *Chamberlain v. Gaillard*, 26 Ala. 504; *Lyon v. Odom*, 31 Ala. 234; *Moore v. Appleton*, 34 Ala. 147; *Bobe v. Stickney*, 36 Ala. 482; *Durr v. Jackson*, 59 Ala. 203; *Kaiser v. Wagoner*, 59 Iowa, 40.

<sup>2</sup> *R. R. Co. v. Henlein*, 56 Ala. 368.

<sup>3</sup> *Resseguie v. Byers*, 52 Wis. 650; *S. C.*, 38 Am. R. 775.

of such services, but afterward failed to appear at the trial, and judgment for the value claimed was entered in favor of the physician ; such judgment was no defense to the action for malpractice, and a supplemental answer setting it up as a plea in bar thereto was demurrable, upon the ground that the issue in this action was not necessarily involved in the justice's suit, and the plaintiff may maintain it notwithstanding the defendant recovered for his services in that court. The plaintiff's claim for damages resulting from malpractice constitutes a separate and independent cause of action, which he can enforce without disturbing any matter litigated in that case. He was not compelled to make the defense before the justice that the defendant's services were of no value, in order to save his rights. He had his election either to *recoup his damages pro tanto* in the justice's court or go for his entire claim in this, and in support of their opinion cite the following cases :

"Sykes v. Bonner,"<sup>1</sup> in which it was held that it was not necessary for the defendant to prove that the plaintiff was guilty of negligence." In another case<sup>2</sup> it was said : "It is very doubtful whether the defendant in the action before the justice could, under his answer, have shown that the plaintiff was guilty of malpractice." (The defendant could certainly have set up all the defenses he had in that action ; and if the action for malpractice was then pending, he certainly could have set it up as a plea in abatement to the action before the justice.)

"O'Connor v. Varney,"<sup>3</sup> where it was held that a judgment for the defendant in an action for work done under a contract, upon the ground of imperfect performance of the work, is a bar to a subsequent action by him to recover damages for such non-performance."

"Bodurtha v. Phelon"<sup>4</sup> was an action brought before a justice of the peace on a note for the price of a horse. The defendant set up a breach of warranty, and judgment was given for a part of the note. The plaintiff appealed, and the defendant was defaulted. *Held* : that that judgment was no bar to an action on the warranty. This was put on the ground that on the appeal the judgment before the justice was vacated, the defendant with-

<sup>1</sup> 1 Cin. Sup. Ct. Rep. 464.

<sup>2</sup> 10 Gray, 231.

<sup>3</sup> Crawford v. Earl, 38 Wis. 312.

<sup>4</sup> 13 Gray, 413.

drew his defense, and judgment was entered for the full amount of the note. The court said: "The plaintiff could not maintain this action, if the judgment recovered against him on his note given to the defendant for the price of the colt were in force. He would have received in the deduction of forty dollars from the amount of that note, his damages for the deception practiced on him by the defendant in the sale of the colt, and have been thereby barred from any further remedy for that deception."

"*Bascom v. Manning*<sup>1</sup> was an action of damages for breach of warranty of cotton. It appeared that the defendant had pleaded the same facts in defense of an action in Massachusetts for the price of the cotton, but suffered judgment there by default. *Held*: that the Massachusetts judgment was no bar." The court said: "Whether there was in fact a warranty, and if so, whether it was broken, and what amount of damages the plaintiff suffered thereby, are questions which were not in point of fact litigated in the Massachusetts suit, and are not, therefore, *res adjudicata*. *It is true, the plea, which was not withdrawn, raised these questions, and there was a judgment for the plaintiffs.* But the fact that there was a judgment upon a default makes it as certain that this counter-claim was not passed upon and settled, by an actual adjudication, as though the plea had been formally withdrawn." (This case completely overrules the doctrine of *res adjudicata*, for the defendant therein by failure to defend, presumptively admitted he had no claim for breach of warranty, and the counter-claim may have been pleaded to gain time and delay the plaintiff in obtaining judgment.)

*Barker v. Cleveland*,<sup>2</sup> where it was held that an action for the purchase price of chattels is not affected by a judgment for breach of warranty of the same. The action for breach of warranty does not necessarily involve the question of payment of the price. The action for breach might be brought before the time for payment had elapsed. "Unless the vendor depends on the ground of non-payment of the purchase price, the court does not concern itself with that question."

*Mondel v. Steele*<sup>3</sup> was an action of damages for breach of a contract to build a ship in a specified manner. The defendant

<sup>1</sup> 52 N. H. 132.

<sup>2</sup> 19 Mich. 230.

<sup>3</sup> 8 M. & W. 858.

pleaded a judgment in a former action for the price, in which the same breach of contract was pleaded, and a deduction was made from the price on account thereof. *Held*: bad, and that the plaintiff might still recover for damage accruing subsequent to the delivery of the ship. Parke, B., said: "It must, however, be considered that in all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established, and that it is competent for the defendant, in all of these, not to set-off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of contract; and to the extent that he obtains or is capable of obtaining an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more."

In *Rigge v. Barbridge*:<sup>1</sup> This was an action of damages for negligent construction of a kitchen range, and the *defendant pleaded payment into court, in an action for the price, of a sum which the plaintiffs took out in satisfaction. Held*: no estoppel. Alderson, B., said: "The present plaintiff may maintain an action against the defendant for negligence in the performance of the work, unless his defense to the former action, for the price of the goods, had been to show that the work and goods were of no value whatever to him." Rolfe, B., said, "It does not at all appear that the defense of the present plaintiff to the former action, for the price of these goods, included the damages sustained by him for the improper working of the range."

In *Davis v. Hedges*:<sup>2</sup> In this case Hannen, J., says, "*Mondel v. Steel leaves undecided the question whether the plaintiff was bound to obtain the abatement in the action in which he was defendant, or might recover it as damages in a cross-action.*" It is clear that before any action is brought for the price of a chattel sold with a warranty, or of work to be performed according to contract, the person to whom the article

<sup>1</sup> 15 M. & W. 598.

<sup>2</sup> L. R. 6 Q. B. 687.

is sold, or for whom the work is done, may pay the full price without prejudice to his right to sue for the breach of warranty or contract, and to recover as damages the difference between the real value of the chattels or work, and what it would have been if the warranty or contract had not been broken. "*We do not mean to throw the least doubt on the cases which establish the general rule that where a party to a litigation has the opportunity to raise some question, and does not avail himself of it, he is in no better position than if he had raised it.*"

§ 233. It may be said that there is some conflict in the decisions in regard to what is concluded by a judgment in favor of a plaintiff, and that the rule established by the case of *Gates v. Preston*, in the Court of Appeals in the State of New York,<sup>1</sup> and the cases maintaining the same doctrine, are not sound on principle. In order to controvert the principle established by these cases, authorities are cited by courts holding a contrary view. That in actions for the price of an article a judgment for the plaintiff is no defense to an action for a breach of warranty, which constituted a counter-claim by the defendant, and was not set up in the action in which the judgment was rendered for the purchase price. It is a well settled rule, based on statutory law in many States, that a counter-claim amounts to or is regarded as a separate and distinct cause of action, and while it may be set up as a defense in an action brought by a plaintiff against a defendant, yet if the plaintiff dismisses his action, it does not affect the counter-claim, and the defendant may proceed in the same manner as if he had originally commenced the suit on his counter-claim.

§ 234. It is, under the reformed codes of procedure, allowable for a defendant to either plead a counter-claim or withhold it and bring an action on such counter-claim. A counter-claim

<sup>1</sup> 41 New York, 113; *Blair v. Bartlett*, 75 N. Y. 150; S. C., 31 Am. Rep. 455; *Bellinger v. Craigue*, 31 Barb. 534; *Howell v. Goodrich*, 69 Ill. 566; *Collins v. Bennett*, 46 N. Y. 490; *Merriam v. Woodcock*, 104 Mass. 326; *Hanley v. Foley*, 18 B. Mon. 519; *Gorman in re*, 124 Mass. 190, *Burden*

*v. Shannon*, 99 Mass. 200; *Lea v. Lea*, 99 Mass. 493; *Reg v. Haughton*, 18 Eng. L. & Eq. 287; *R. v. Hartington*, 4 E. & B. 780; *Heath v. Frackelton*, 20 Wis. 320; *State v. Beloit*, 20 Wis. 79; *Dudley v. Stiles*, 32 Wis. 372; *Lamprey v. Nudd*, 29 N. H. 299; *Swenson v. Cresop*, 28 Ohio St. 668.

must tend in some way to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or in a proper case, against the person whom he represents, and in favor of the defendant, or one or more defendants, between whom and the plaintiff a separate judgment may be had in the action: First. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. Second. In an action on contract existing at the commencement of the action. This is decided in New York, Wisconsin, North Carolina, Indiana and Minnesota, and is the same in every State where the provisions of the New York Code, or similar ones, are in force.

§ 235. A counter-claim includes recoupment and set-off, either of which must be used by the defendant in the same action, to claim damages from the plaintiff, and are used for the purpose of liquidating the whole or part of the plaintiff's claim. Set-off is unknown to the common law, and only takes place in actions on contracts for the payment of money, as assumpsit, debt, covenant; unliquidated damages cannot be set off. In *Blair v. Bartlett*, (*supra*) Folger, J., in following the *Gates* case, after laying down the rule that a judgment is conclusive as to everything necessarily involved in the issue, and that the value of the services was necessarily involved and passed upon, said: "But if of value they could not have been useless; and if of use they could not have been harmful; and if not harmful they could not have been *mala praxis* in the performance of them. Hence it is *res adjudicata* between these parties, that there was not the malpractice, on the allegation of which, in this action, the plaintiff here seeks to recover." In *Dunham v. Bower*,<sup>1</sup> Church, C. J., said: "If the allegations in this case are true, the defendant was not only not entitled to any freight, but the plaintiff was entitled to a judgment for the whole amount of his damages. I do not see how a right to freight and a right to damages for the destruction of the whole property, caused by a violation of the shipping contract can co-exist." This seems to be the correct rule, however "odious" it may be in some cases. Where the plaintiff has no

<sup>1</sup> 77 N. Y. 76; S. C., 33 Am. Rep. 570.

claim, the defendant cannot have a counter-claim. The two claims in such a case cannot co-exist; hence a recovery in one must be a denial of the other. The claim of the patient against the physician for malpractice, does not admit the physician's claim, but denies it altogether; while a counter-claim admits the plaintiff's demand, but seeks to reduce it, or even extinguish it, by a legal or equitable set-off. It cannot, therefore, in strict legal sense, be a counter-claim, and, therefore, is not the subject of an independent action. In all cases of counter-claim, no rule of *res adjudicata* can apply in antagonism to a direct statutory provision.

§ 236. Courts maintaining a doctrine contrary to that of *Gates v. Preston* do so (except where otherwise compelled by statute), by violating every principle upon which the doctrine of *res adjudicata* is founded. Without citing again the long and unbroken line of cases which will be found in another portion of this work, we may state the following as the substance of the decisions. First. The maxim, "*interest reipublicæ ut sit finis litium*" has never yet been questioned; and, Second. Whenever a matter is adjudicated, such judgment decides every matter which pertains to that cause of action or the defense set up, or which is involved in the measure of relief to which the cause of action or defense entitles the party, even though such matter may not be set forth in the pleadings, so as to admit proof and call for an actual decision upon it. This principle prevails throughout the civilized world, with but few exceptions, and includes not only what actually was determined, but also extends to every other matter which under the issues the parties might have litigated in the case; to everything within the knowledge of the parties which might have been set up as a ground of relief or defense. This principle is but the repeated reiteration of the maxim above cited, which is so deeply fixed in the law of fundamentals. The maintenance of this principle is one of the necessities in all civilized communities, and it has been handed down from generation to generation without ever being questioned until the present time; and we doubt whether there ever can be a well-established and universally sustained principle of law. A court that cannot doubt, distinguish, or make an exception to a well-settled rule of law is among the impossibilities of this age.

The case of *Gates v. Preston* follows the universal rule above cited. In the early case of *Marriott v. Hampton*, it was there held that where, in an action, a party had a complete defense, as payment, and failed to maintain it, he was concluded by that judgment, and although he had the written receipt of the plaintiff, yet he was compelled to pay the same money twice. This principle has never been questioned. So a party having a defense like that of usury, limitation, coverture, the statutory right of exemption, or any defense which will defeat a plaintiff's claim, and fails to set up such defense, cannot thereafter re-litigate matter which would have defeated the plaintiff's action in another cause between the same parties by simply reversing their positions as parties.

§ 237. The decision in *Gates v. Preston*, and the cases maintaining the principle there decided, hold, that in an action brought for the recovery of money for services rendered, and other similar causes, the plaintiff is bound to prove, first, that he rendered the services at the request of the defendant; second, the value of such services; third, that the amount claimed is just, due and owing from the defendant to the plaintiff. If such services were worthless, the plaintiff is not entitled to recover, and it is the duty of the defendant in that action to plead such defense. It is trifling with justice, it is disturbing the peace and repose of society, to allow the defendant, after a court of competent jurisdiction has given him a fair and full opportunity to defeat a plaintiff attempting to maintain an action against him, and he virtually confessing the plaintiff's cause of action, to then permit him to maintain a new cause of action against the plaintiff on a state of facts which would have fully defeated the plaintiff and caused the rendition of a judgment in defendant's behalf. It is difficult in all cases to follow well-established and well-settled principles of law. It is difficult for courts of justice to render judgments against parties who, from some unfortunate cause, should not be compelled to submit to them. It may, in some cases, be rewarding a vigilant attorney by maintaining the doctrine in *Gates v. Preston*, and it may be a rebuke to the same attorney to maintain the contrary doctrine. It may be sharp practice for an attorney to bring an action of this kind before a justice of the peace, for services rendered, while an action is

pending in a superior court, between the same parties, for malpractice; but that certainly cannot in any event affect the well-known principle of *res adjudicata*.

§ 237A. In another portion of this work it will be seen from a long and unbroken line of decisions that there is a great underlying principle applicable, which is, in many cases relating to judgments, as controlling as the principle upon which the whole doctrine of *res adjudicata* is founded. It is a well-settled principle of law and equity that a party (with a very few exceptions in a particular class of cases), may waive any statutory or constitutional right, or other privilege granted him. Thus, he may waive a trial by jury, the defenses of limitations, usury, exemption, a sale on appraisement, service of citation, and numerous other matters. He may waive a plea in abatement; and where, in an action brought for malpractice against a physician, the plaintiff, either by reason of neglect or ignorance, permits the physician to bring a subsequent action to recover the value of the identical services, which the patient claims were worthless, and allows the physician to recover in the subsequent action, and during the pendency of the action for malpractice against the physician, without pleading his action of malpractice in abatement, or making any defense to the suit, *he waives that defense* or plea, and is as completely precluded by such waiver as he would be by waiving a defense of usury, limitations, coverture, or failing to object to the admission of testimony or other like matter. “*Quilibet potest renunciare juri pro se inducto.*”

§ 237B. There can never be an end to litigation unless courts are willing to abide by well-settled, fundamental principles of law. Whenever a party is afforded full and complete remedies for every cause of complaint, it should be an unquestionable rule, that unless such party accepts the opportunity thus afforded him by law, he forever thereafter deprives himself of it. The application of this rule may be regarded as a salutary one, the principle that “*nemo debet bis vexari, pro una eadem causa,*” that no man shall be vexed twice for the same cause, should be applicable, with the same force to a plaintiff as to a defendant, and if neither of the parties should be vexed by the same cause twice, certainly the rights of the public are of as great importance as the rights

of the parties, and the public should not be compelled to pay for twice litigating a cause when the matters in controversy can be settled and finally adjudicated in one action.

§ 238. There is another well-settled rule (to which the cases need not be here repeated), and that is one supported by a long and unbroken current of authorities, that where a party having a good defense to an action who fails to set it up cannot set it up in another action, nor can he after judgment obtain relief in a court of equity.<sup>1</sup> And another well-settled rule—that of merger. If the rule established in the Wisconsin case is to become the law, there will be little need of attorneys or reports, as no decision of any court establishing a principle can be relied upon by a professional man, as a precedent in a case upon a precisely similar state of facts. And it will make no difference as to whether a party defeats a plaintiff in an action against him by pleading a strictly legal defense to such action, or whether he confesses judgment in favor of the plaintiff, and then subsequently brings an action on the defense which would have defeated the prior claim. While it may be true that every man has a right to try his own case, it is also true that in every contested action each one of the parties tries his own case to the best of his ability; and in all courts of justice each party is afforded every facility to try his case fairly and fully; and when this opportunity is given and neglected, the maxim, *Interest rei publicae ut sit finis litum* applies. It is to be regretted, that in order to deprive the defendant of a technical advantage, that a court could do it in no other way than by establishing a rule which cannot do otherwise than increase litigation. While the estoppel sought to be made available in this case may be correctly termed “odious,” under the circumstances stated, it must be conceded that the judgment before the justice of the peace could not have been rendered by default without the negligence or consent of the defendant. Upon the doctrine of estoppel by conduct, by negligence, by election, or waiver, upon all of these grounds, and the further ground of *res adjudicata*, and merger the judgment rendered by the justice of the peace should have been held a complete bar. Numerous cases might be cited to

<sup>1</sup> Fleming v. Munn, 61 Miss. 603; Grindoe v. Ruby, 14 Ill. App. 439; Nav. Co. v. Gates, 10 Oreg. 514.

support this view, but it is unnecessary to repeat them here. In a late case in Indiana the court said: "In a suit against two surgeons for malpractice, a separate answer by one that he had sued the plaintiff before a justice of the peace, having jurisdiction, to recover for his services in the same matter, that there was an answer that the services were worthless, and a trial and judgment for the amount of the claim sued for, which remains in force, is good; but if it be alleged that the judgment was without answer and on default, it is bad, and a reply to such good answer, that the suit for malpractice was pending when that before the justice of the peace was commenced, is bad.<sup>1</sup>

§ 239. In a judicial proceeding in a court of record, where a party is called upon to make good his cause of action or establish his defense, he must do so by all the proper means within his control, and if he fails in that respect, purposely or negligently, he will not afterward be permitted to deny the correctness of the determination, nor to re-litigate the same matters between the same parties.<sup>2</sup> If a party having a defense which he might make, omits to do so, he waives it.<sup>3</sup> If a party fails to plead a fact he might have pleaded, or makes a mistake in the progress of an action, or fails to prove a fact he might have proven, the law can afford him no relief. When a party passes by his opportunity the law will not aid him. By refusing to relieve parties against the consequences of their own neglect, it seeks to make them vigilant and careful. On any other principle there would be no end to an

<sup>1</sup> *Goble v. Dillon*, 86 Ind. 327; S. C., 47 Am. R. 308.

<sup>2</sup> *Covington, &c. Bridge Co.*, 27 Ohio S. 233; *Swenson v. Cresop*, 28 Ohio S. 668; *McDowall v. McDowall*, 1 Bail. 324; *Marnott v. Hampton*, 7 T. R. 269.

<sup>3</sup> *Swenson v. Cresop*, 28 Ohio S. 668; *Ilite v. Irwin*, 13 Ohio S. 283; *Ewing v. McNairy*, 20 Ohio S. 315; *Buren v. Hone*, 2 Barb. 596; *Vail v. Vail*, 7 Barb. 242; *Embury v. Conner*, 3 N. Y. 522; *Tate v. Hunter*, 3 Strobb. Eq. 138; *Dalton v. Lane*, 13 Iowa, 538; *Hackworth v. Zollars*, 30 Iowa,

433; *Gay v. Dougherty*, 25 Cal. 272; *Pierce v. Kneeland*, 9 Wis. 30; *Le Guen v. Gouverneur*, 1 Johns. Cas. 492; *Serra v. Hoffman*, 29 La. Ann. 17; *Thomas v. Towns*, 66 Vt. 602; *Treadway v. McDonald*, 51 Iowa, 663; *Green v. Glynn*, 71 Ind. 336; *Young v. Babilon*, 91 Pa. St. 280; *Hood v. Parker*, 63 Ga. 510; *Randolph v. Little*, 62 Ala. 396; *Morton v. Weaver*, 99 Pa. St. 47; *Arnold v. Kyle*, 8 Baxt. 319; *Dunham v. Bower*, 77 N. Y. 76; S. C., 33 Am. R. 570; *Goddard v. Gray*, L. R. 6 Q. B. 139; *Mally v. Mally*, 52 Iowa, 654.

action, and there would be an end to all vigilance and care in its *preparation and trial*.

§ 240. When it is said that a judgment is final and conclusive upon all the parties to it as to all matters which might have been litigated and decided in the action, the expression must be limited to such matters only as might have been used as a defense in that action against an adverse claim therein ; such matters, if subsequently considered as would involve an inquiry into the merits of the original judgment, as where A. recovers a judgment against B. on his note. Previous to the rendition of the judgment B. had paid one half of the note, which was never credited, and not taken into consideration in the suit against him. B. then brings an action to recover back such payment. In the trial of the action on the note, B. is present in court and confesses judgment for the amount. The question is this: A judgment is rendered against a defendant ; if he properly defends the action he can reduce the amount by showing the payment made. He neglects to do this. Can he afterwards be permitted in an independent action to recover such payment ? A litigation between parties is conclusive upon all matters in issue, when carried into judgment. It is not only conclusive as to matters actually mooted, but also those which the parties might have controverted in the cause. In the suit on the note, B. might have proved that he made the payment. But he omitted to set up that defense, and he can not do so after judgment is rendered against him. Payment is strictly a matter of defense, and such must be insisted on when the opportunity offered in the action on the note.<sup>1</sup> So, where A. sued B. for the price of goods sold, for which B. had paid and obtained a receipt, before the suit was commenced, not being able to find his receipt, and having no other proof of payment, A. recovered judgment against B. for the price of the goods sold ; B. was obliged to submit to the payment of the money again, but afterwards found the missing receipt, and brought an action against A. for money had and received, to recover back the amount of the sum of payment thus wrongfully enforced ; but he was estopped on the ground that the former suit was conclusive, and that money paid under legal process could not be

<sup>1</sup> Swenson v. Cresop, 28 Ohio S. 668; Mervine v. Parker, 18 Ala. 241.

recovered back again; and the same evidence used in the second suit would have been a good defense in the first; B. was bound to either produce the evidence or submit to the judgment of the court, and that, when once *res adjudicata*, it was conclusive in any subsequent action arising from the same transaction.<sup>1</sup>

§ 241. Matter which would have been a defense to a former action cannot afterwards be made the subject of another suit. Thus, where a party has an opportunity to set up fraud as a defense to a suit at law, but omits to do so, he cannot maintain a bill in chancery for the same fraud.<sup>2</sup> The judgment of the court is not only final as to the matter actually determined, but as to every other matter which the parties neglect to litigate in the cause, and which might have been decided; but this is only limited to mere matters of defense.<sup>3</sup> Thus, a party who might have set up his discharge in bankruptcy in bar of an action against him cannot avail himself of that discharge in a suit in equity founded on that judgment.<sup>4</sup> A discharge in bankruptcy does not operate as a payment, but is simply a bar to the enforcement of the obligation; and, unless pleaded in defense by the debtor, it is waived. It is a purely personal defense, and is not available to any but

<sup>1</sup> Marriot v. Hampton, 7 T. R. 269; Belcher v. Mills, 2 C. M. & R. 150; Le Chevalier v. Lynch, 1 Doug. 170; Wilson v. Ray, 10 A. & E. 82; Reynolds v. Wedd, 4 Bing. N. C. 694; Phillips v. Hunter, 2 H. P. L. 402; Philpot v. Aslett, 1 C. M. & R. 85; Lane v. Chapman, 11 A. & E. 966; Denne v. Knott, 7 M. & W. 143.

<sup>2</sup> Baker v. Stinchfield, 57 Me. 363; Loring v. Mansfield, 17 Mass. 394; Tilton v. Gordon, 1 N. H. 33; Binck v. Wood, 43 Barb. 315; Corbet v. Evans, 25 Pa. St. 310; Davis v. Murphy, 2 Rich. 560; Broughton v. McIntosh, 1 Ala. 103; Mitchell v. Sandford, 11 Ala. 695; Bates v. Spooner, 45 Ind. 489; Greenabaum v. Elliott, 60 Mo. 25; Footman v. Stetson, 32 Me. 17; Turner v. Dibble, 59 Tenn. 235; Doak v. Wiswell, 33 Me. 355; Walker v. Ames, 2 Cow. 428; Dudley v. Styles, 32 Wis. 371; Luttrell v. Fisher, 11

Heisk. 101; Gold v. Fite, 58 Tenn. 237; Taylor v. Chambers, 1 Ia. 124; Jones v. Weatherbee, 4 Strobb. 50; Dubois v. Phila. & Co., 5 Fish. Pat. Cas. 208; Powell v. Davis, 19 Tex. 380; Shaffer v. Scuddy, 14 La. Ann. 575; Mitchell v. Gillespie, 25 Ga. 346; Rockwell v. Langley, 19 Pa. St. 502; Bullock v. Ballen, 9 Tex. 498; Barksdale v. Greene, 29 Ga. 418; Hatch v. Garza, 22 Tex. 176; Doyle v. Reilly, 18 Ia. 108; Fowler v. Atkinson, 6 Minn. 503; Gainard v. Heysenger, 15 Ill. 288; Bobe v. Stickney, 36 Ala. 482; Jemsbury v. Mummery, L. R. 8 C. P. 56; Newington v. Levy, L. R. 6 C. P. 180.

<sup>3</sup> Dewey v. Peck, 33 Ia. 342; Poorman v. Mitchell, 48 Mo. 45; Smith v. Abbott, 40 Me. 442.

<sup>4</sup> Marsh v. Mandeville, 28 Miss. 122.

the bankrupt Thus, a judgment rendered against a defendant, subsequent to his discharge in bankruptcy, in an action commenced before the proceedings in insolvency were instituted, is not void on the ground that the judgment was in violation of the restraining order made at the commencement of the proceedings in insolvency, or that the defendant was discharged from all his debts and liabilities, including the debt of the plaintiff, prior to the rendition of the judgment. The defendant is entitled to plead his discharge in bar of the action, by supplemental answer. If that fact be pleaded, the judgment of the court is conclusive that the plaintiff was entitled to judgment, notwithstanding the alleged discharge in bankruptcy. If the defendant omit to plead the discharge in bankruptcy, the judgment is equally conclusive upon him as it would be had his defense been accord and satisfaction, payment, &c.; which he had neglected to plead.<sup>1</sup> So, where in an action the complaint avers that a defendant has some interest which is unknown to the plaintiff, and such defendant, being personally served with summons fails to appear, and the judgment does not find any interest in him, he cannot in a new action recover; the judgment concludes him.<sup>2</sup> So, where a defendant in ejectment, without excuse, fails to set up a claim for improvements, he cannot afterwards come into equity to assert it.<sup>3</sup>

§ 242. A party is estopped from raising any question which might have been determined in a former suit between the same parties and upon the same subject matter, provided he was not prevented from raising it in such former suit by the wrongful act of the other party.<sup>4</sup> Courts cannot decide matters by halves.

<sup>1</sup> *Rahm v. Minnis*, 40 Cal. 421; *Serra v. Hoffman*, 29 La. Ann. 17; *Ludeling v. Felton*, 29 La. Ann. 219.

<sup>2</sup> *Morenhout v. Higuera*, 32 Cal. 289, *Benjamin v. R. R.*, 49 Barb. 441; *Hose v. Allwein*, 91 Ind. 497; *Cook v. Allen*, 2 Mass. 462.

<sup>3</sup> *Moody v. Harper*, 38 Miss. 599; *Pope v. Stansbury*, 2 Bibb, 523; *Morton v. Outland*, 16 Ohio S. 383.

<sup>4</sup> *United States v. Throckmorton*, 98

U. S. 65; *Pearce v. Olney*, 20 Conn. 544; *Wierich v. De Zoya*, 7 Ill. 385; *Kent v. Ricards*, 3 Md. Ch. 392; *Smith v. Lowry*, 1 Johns. Ch. 320; *De Louis v. Meek*, 2 Gr. 55; *Greene v. Greene*, 2 Gray, 361; *Dixon v. Graham*, 16 Iowa, 310, *Cottle v. Cole*, 20 Iowa, 482; *Borland v. Thornton*, 12 Cal. 440, *Railroad Co. v. Neil*, 1 Wood, 353; *Brooks v. O'Hara*, 2 McCrary, 644.

If a defendant has been before a competent tribunal, which has proceeded to *judgment*, that decision, *until reversed*, is conclusive upon him in every tribunal having concurrent or other jurisdiction. It is conclusive upon him as to every matter of defense, not only presented but which could have been presented by him, and it is conclusive upon him, although the judgment be erroneous, if he acquiesce in it and does not proceed to reverse it. It is conclusive upon him, because a party whenever he is brought into a court is bound to full diligence, which, if he uses, he will obtain his right—if he neglects either in putting in proper pleas, or introducing all his evidence to support them, he has no one to blame but himself; nor will his neglect in one court be allowed to give him a right to a second trial, either in that court or another.<sup>1</sup>

§ 243. Where two or more successive actions are identical as to the parties, the alleged cause of action, and the relief demanded, a judgment upon the merits in the first action will estop any and all parties from maintaining the subsequent one.<sup>2</sup> This rule applies in equity as well as at law.<sup>3</sup> “The law does not tolerate a second judgment for the same thing, between the same parties, whether the claim is upon a contract or tort. The general rule is, that it is against the policy of the law to permit a plaintiff to prosecute in a second action for what was included in and might have been recovered in the first, because it would

<sup>1</sup> Maxwell v. Connor, 1 Hill Ch. 22; Hand v. R. R Co., 17 S. C. 219; Price v. Dewey, 6 Sawyer, 493; S. C., 11 Fed. R. 104.

<sup>2</sup> Tuttle v. Harrill, 85 N. C. 456; Smith v. Ontario, 18 Blatchf. 454; Pieble v. Supervisors, 8 Biss. 358; Cemetery Co. v. People, 93 Ill. 619; Challis v. Smith, 25 Kas. 563; Johnson v. Lovelice, 61 Ga. 62; Mally v. Mally, 52 Iowa, 454; Jacobson v. Miller, 41 Mich. 90; Davis v. Bedsole, 69 Ala. 362; Timon v. Whitehead, 58 Tex. 290; Gerardin v. Dean, 49 Tex. 243; Garner v. State, 28 Kas. 790; McWilliams v. Monell, 23 Hun, 162; Mathews v. Green, 12 Phila. 341;

Thompson v. Blanchard, 2 Lea, 528, Trescott v. Baines, 51 Iowa, 109, Price v. Dewey, 6 Sawyer, 493, Mason v. Buchtel, 101 U. S. 638, Renick v. Ludington, 20 W. Va. 511; Goodenow v. Litchfield, 59 Iowa, 226.

<sup>3</sup> Waring v. Lewis, 53 Ala. 615; King v. Smith, 15 Ala. 270; Watts v. Gayle, 20 Ala. 826; Allman v. Owen, 31 Ala. 167; Duckworth v. Duckworth, 35 Ala. 70; Otis v. Dargan, 53 Ala. 178; Brooks v. Aukenny, 7 Oreg. 461; Powers v. Bank, 129 Mass. 44; Caldwell v. White, 77 Mo. 471; Norwood v. Kirby, 70 Ala. 397; Price v. Dewey, 6 Sawyer, 493; McWilliams v. Monell, 23 Hun, 162.

harass the defendant and expose him to double costs. This is so far modified that when claims are distinct, though all might have been recovered in the first action, it will not bar a second for one which was not demanded or proved in the first. But where the contract is entire, and there is a recovery upon such contract, the party cannot maintain a second suit even on clear proof that no evidence was given in the first as to part of the demand in controversy."<sup>1</sup> Where the action is on one of several distinct and independent contracts, the rule that whatever might have been litigated will be deemed to have been litigated, applies in its full force only to the particular contract sued on."<sup>2</sup>

§ 244. A judgment extinguishes the demand, and if a plaintiff bring two actions for the same cause<sup>3</sup> a judgment in one is a bar in the other, and is conclusive in any future litigation of the same question between the parties and those claiming under them, whether the question arises either directly or collaterally in such subsequent litigation, provided the question of estoppel is brought before the court in the proper form; and it makes no difference in this respect that the object of the first suit was different from the second. A judgment against a defendant for the amount of a note or claim for goods sold, etc., bars an action for fraud in obtaining the note or goods.<sup>4</sup> A demand which has been passed upon as a set-off, or by way of defalcation or recoupment, cannot be made the subject of any other cause of action.<sup>5</sup> It is set-

<sup>1</sup> Sykes v. Gerber, 98 Pa. St. 179; Logan v. Caffrey, 30 Pa. St. 196.

<sup>2</sup> Davis v. Brown, 94 U. S. 423; Felton v. Smith, 88 Ind. 149.

<sup>3</sup> White v. Steam, &c. Co., 6 Cal. 462.

<sup>4</sup> Arnold v. Kyle, 8 Baxt. 319; Caylus v. R. R., 76 N. Y. 609; Howell v. Earp, 21 Hun, 93; Duncham v. Bower, 77 N. Y. 76; S. C., 33 Am. R. 570.

<sup>5</sup> Dudley v. Stiles, 32 Wis. 371; Davis v. Converse, 35 Vt. 503; Blake v. McCusick, 10 Minn. 251; Smith v. Berry, 37 Me. 298; Davis v. Milburn, 4 Iowa, 246; Sutherland v. Mullis, 17 Ind. 190; Sargeant v. Fitzpatrick,

4 Gray, 511; Taylor v. Chambers, 1 Iowa, 124; Hudelmeyer v. Hughes, 13 Mo. 87; Andrews v. Varrell, 46 N. H. 17; McGilvray v. Avery, 30 Vt. 538; Bank, &c. v. Wheeler, 28 Conn. 433; Jones v. Richardson, 5 Met. 247; Nave v. Wilson, 33 Ind. 294; Baker v. Stinchfield, 57 Me. 363; O'Connor v. Varney, 10 Gray, 331; Bennet v. Smith, 4 Gray, 50; Eastmure v. Laws, 5 Bing. N. C. 444; Sawyer v. Woodbury, 7 Gray, 499; Kelly v. Pike, 5 Cush. 484; Sargent v. Fitzpatrick, 4 Gray, 511; Sprague v. Wait, 19 Pick. 457; Simes v. Zane, 24 Pa. St. 242; Rogers v. Rogers, 1 Daly, 194; McLean v. Hugarin, 13 Johns. 184; Gunsaulis

tled by the judgment as conclusively when it does not appear to have been allowed, as though there were an express finding against it. Where an action was brought, and a counter-claim as a defense was brought by the defendant, but before the final submission the defendant withdrew the counter claim, and judgment was rendered against the defendant, the defendant cannot afterward bring a suit against the plaintiff in another court for the counter-claim. It has become *res adjudicata*. So, a vendee who elects to set up fraud or breach of warranty in mitigation of damages, or as a bar to an action for the purchase money, will be concluded by the judgment, and is estopped from afterwards bringing an action, on the defense that he pleaded in the former suit.

§ 245. An estoppel created by a judgment is not limited to facts admitted or proved. Judgments turning exclusively upon questions of law are equally conclusive. It is the judgment itself, whatever may be its form, and without any regard to the nature of the question in controversy, that creates the estoppel, and when the same question is at issue between the parties in two successive actions, a judgment rendered for the defendant in the first is an absolute bar to a recovery in the second, although the evidence in the second, had it been given in the first, would have entitled the plaintiff to recover,<sup>1</sup> and although the subject matter of the subsequent suit is different from the first, when it depends upon the same question it is equally conclusive. Thus, where A. gave B. a bill of sale of property, C. a constable levied an execution against A. upon the property, but did not remove

v. Cadwallader, 48 Iowa, 43; Mason Co. v. Buchtel, 101 U. S. 638; Butler v. Glass Co., 126 Mass. 512; Schmidt v. Zahensdorf, 30 Iowa, 498; Vincent v. Rogers, 33 Ala. 224; Inslee v. Hampton, 18 N. Y. Supreme Ct. 156; Collins v. Bennett, 46 N. Y. 490; McGuinity v. Herick, 5 Wend. 240; Mathews v. Green, 12 Phila. 341; Barras v. Bidwill, 3 Woods, 5; Reynolds v. Reynolds, 3 Ohio, 268; Janney v. Smith, 2 Cranch C. C. 499; Wright v. Salisbury, 46 Mo. 26; Patrick v. Shaffer, 94 N. Y.

423; Miller v. Ticker, 14 Ill. App. 588; Worrel v. Smith, 6 Col. 141.

<sup>1</sup> Gunsaulis v. Cadwallader, 48 Ia. 48.

<sup>2</sup> Bell v. McCullough, 31 Ohio S. 397; Nichols v. Dusenbury, 2 N. Y. 286; Beall v. Pearre, 12 Md. 550; Burnett v. Smith, 4 Gray, 50; Grant v. Button, 14 Johns. 377; Newby v. Caldwell, 54 Iowa, 103.

<sup>3</sup> Birkhead v. Brown, 5 Sandf. 134; Miller v. Manice, 6 Hill, 14; Parker v. Wright, 63 Ind. 398; Heroman v. Louisiana, 34 La. Ann. 805.

it; A. subsequently converted it to his own use, for which conversion C. sued him and obtained judgment that the sale was fraudulent and void as to the creditors of A. *Hell*, in a subsequent replevin by B. against C., that the former judgment was conclusive upon the question of fraud in the bill of sale.<sup>1</sup> And where a plaintiff brought an action against a sheriff for taking certain personal property, which on final hearing was determined against the plaintiff, after the sheriff had sold the property the plaintiff brought an action to recover the same of the purchaser at the sheriff's sale, and it was held that the judgment in the suit against the sheriff was a bar to the action against the purchaser.<sup>2</sup> So, where a sheriff recovers a judgment for the value of goods levied on by him, which he left with a receptor, he is estopped, in an action by the execution plaintiff, from showing that the goods did not belong to the judgment debtor.<sup>3</sup>

§ 246. It is not necessary to the conclusiveness of the former judgment that the issue should have been taken upon the precise point controverted in the second trial; it is sufficient if it was essential to the finding of the former verdict.<sup>4</sup> Thus, where the parish of Islington was indicted and convicted for not repairing a certain highway, and afterwards the parish of St. Pancras was indicted for not repairing the same highway, on the ground that the line dividing the two parishes ran along the middle of the road, it was held that the former record was admissible and conclusive evidence for the defendants in the latter case to show that the road was wholly in Islington; for the jury must have found that it was so, in order to find a verdict against the

<sup>1</sup> Doty v. Brown, 4 N. Y. 71; White v. Coatsworth, 6 N. Y. 137; Castle v. Noyes, 14 N. Y. 329; Mayhue v. Snell, 37 Mich. 305; Thew v. Porcelain Co., 8 S. C. 286; Betts v. Starr, 5 Conn. 553; Williams v. Fitzhugh, 44 Barb. 321; Walker v. Chase, 53 Me. 258; Jennison v. West Springfield, 13 Gray, 544; Sawyer v. Woodbury, 7 Gray, 503; Birkhead v. Brown, 5 Sand. 134; Spencer v. Dearth, 43 Vt. 98; Transportation Co. v. Traube, 59 Mo. 362.

<sup>2</sup> Prentiss v. Holbrook, 2 Mich. 372.

<sup>3</sup> People v. Reeder, 25 N. Y. 302.

<sup>4</sup> Rex v. St. Pancras, Peake, 219; Cleve v. Powell, 1 M. & R. 228; Hitchen v. Cambell, 2 Bla. 830; Jennison v. West Springfield, 13 Gray, 594; Overseers v. Overseers, 73 Pa. St. 301; Cabot v. Washington, 41 Vt. 68; Strutt v. Bovington, 5 Esp. 57; Reg. v. Hutchins, 5 Q. B. D. 353.

defendants,<sup>1</sup> So an adjudication upon an order that a woman had a settlement in W., is conclusive upon that town in a subsequent proceeding for the removal of the woman's bastard son, who was a minor at the time of the adjudication, and precludes any inquiry into facts precedent to such adjudication, as affecting the question of her settlement.<sup>2</sup> But it has been held that the record of a judgment recovered against the owner of the land, in a suit by the town authorities for obstructing a highway, is not conclusive evidence of the existence of a public highway at the point in dispute in a suit, by the same party, to enjoin such town authorities from opening a road over his land at the disputed point.<sup>3</sup> The propriety of this decision may well be doubted when it is considered that there had been several actions determined between the same parties in which judgment had been rendered against the owner of the land for obstructing that highway. There can be no question but what the owner was compelled to set up a defense which involved the question as to whether there was a highway, and that question having been twice determined against the same party in favor of the same plaintiff, should have been held conclusive in an action between the same parties upon the question as to there being a highway at that particular point. If it was litigated, it might have been in the former action, and was a legitimate matter of defense. A judgment is evidence against other parties, whenever the matter in dispute is a question of public right, and all persons standing in the same situation are affected by it, and it is evidence to support or defeat the right claimed. Thus a verdict finding a prescriptive right of tything, the right of a city to toll,<sup>4</sup> the right of election of a church warden,<sup>5</sup> a customary right of common, liability of a parish to repair a particular road,<sup>6</sup> a public right of way,<sup>7</sup> or the like, is evidence for or against the custom or right: though neither of the litigating parties are named in or claimed under those who are parties to the record.

§ 247. The estoppel of a judgment extends beyond what appears on its face; it includes every allegation made by the

<sup>1</sup> *Westmoreland v. Conemaugh*, 34 Pa. St. 231.

<sup>2</sup> *Cabot v. Washington*, 41 Vt. 168.

<sup>3</sup> *McIntyre v. Storey*, 80 Ill. 127.

<sup>4</sup> *London v. Clarke*, Carth. 181.

<sup>5</sup> *Barry v. Banner*, Peake N. P. 156.

<sup>6</sup> *Rex v. St. Pancras*, Carth. 181.

<sup>7</sup> *Reed v. Jackson*, 1 East, 855.

plaintiff and denied by the defendant; it extends to every fact in issue between the parties that was adjudicated in the action; and while it not only proves and establishes the case of the successful party, it denies and refutes that of the other; and on this principle a judgment in one action on a mortgage conclusively establishes the debt for which it is given is justly due.<sup>1</sup> So, a judgment for the plaintiff on a contract is conclusive, not only that the plaintiff shall recover the amount awarded by the jury as damages or compensation, but that he has done every act and performed all the stipulations that were conditions precedent to the right to maintain the action; and the defendant is estopped from afterwards alleging that the plaintiff has failed to do what the judgment has formally declared he has done.<sup>2</sup> A judgment for the plaintiff in an action of unlawful detainer is conclusive as to the existence of the relation of landlord and tenant between the parties, and as to the defendant's wrongful holding over; and these issues cannot be again tried under color of a suit in chancery.<sup>3</sup> So, a master who fails in an action for negligence against his servant, cannot, in a subsequent action by the servant for wages, avail himself of the negligence as a defense to the action, the former judgment having disposed of that question. So, a servant wrongfully discharged may sue for breach of contract or for wages earned, and in the former case a recovery equal to the amount of wages up to the time of the action bars any further action.<sup>4</sup> A judgment against two or more defendants jointly is an entirety, and neither party can take any advantage of it without affecting all; it cannot be void in part and good in part; it must be either entirely void or not at all, and if reversed as to one must be as to all.<sup>5</sup> Where a motion to set aside a verdict is overruled, and judgment is entered on the verdict, a similar motion in the same suit between the same parties or their privies

<sup>1</sup> *Richard v. Crawford*, 48 Iowa; *Outiam v. Morewood*, 3 East, 346; *Stevens v. Hughes*, 31 Pa. St. 381; *Haggerty v. Burr*, 22 Iowa, 219; *People v. San Francisco*, 27 Cal. 655; *Herman v. Louisiana*, 34 La. Ann. 805.

<sup>2</sup> *Burke v. Miller*, 4 Gray, 224; *Boston v. Haynes*, 33 Cal. 31.

<sup>3</sup> *Green v. Clark*, 12 N. Y. 343;

*Ross v. Weber*, 26 Ill. 221; *Davis v. Talcott*, 12 N. Y. 184; *Stevens v. Miller*, 13 Gray, 383.

<sup>4</sup> *Norwood v. Kirby*, 70 Ala. 397.

<sup>5</sup> *Richardson v. Machine Works*, 78 Ind. 422, S. C., 41 Am. R. 584.

<sup>6</sup> *Buffin v. Ramsdell*, 55 Me. 252; *Puige v. Esty*, 54 Me. 319.

in estate, to set aside a verdict settling the same question in the same way, cannot be heard. The judgment is conclusive on the parties and their privies in estate; the matter in litigation, having passed *in rem judicatum*, is finally settled, and is conclusive when arising in a subsequent proceeding, though before a different tribunal. But where points come collaterally or incidentally under consideration, or can only be argumentatively inferred from the decree, the rule does not apply;<sup>1</sup> and where a bill is filed in a United States court during the pendency of a suit in another action in a State court, against both the parties to the bill, to enforce a claim to the same premises, it was held, that as the parties, the objects and the equities were different, and the relief prayed for involved a different decree, the suit in the State court constituted no bar to the bill. But where the validity of a patent has been in part sustained in one Federal circuit and suit is brought in another circuit for infringement, by a party who has contributed to the payment of the counsel who had defended the first suit, the defendant will be estopped by the adjudication in the circuit where the other action is pending, and no decree will be entered in any other circuit until the conclusion of the litigation in such other circuit.<sup>2</sup>

§ 248. A decree of the United States court giving a discharge in bankruptcy under the act of Congress establishing a uniform system of bankruptcy throughout the United States, is conclusive, unless the certificate has been impeached for fraud, or the debt is one of the fiduciary class, which is saved from the operation of the act. So, a decree showing an absolute discharge, that the bankrupt was authorized to receive it, is as conclusive as the certificate itself. A judgment of a court of general jurisdiction in a case requiring ordinary adversary proceedings, where it has jurisdiction of the subject-matter and of the person, is not void, and can not be attacked collaterally for fraud or irregularity in the proceedings in which it was obtained. The United States District Court, sitting in bankruptcy, is such a court. A discharge in bankruptcy can not be impeached collaterally in any State court for fraud or irregularities in obtaining the same.

<sup>1</sup> Ridgley v. Stillwell, 27 Mo. 128;  
Ante, Ch. III.

<sup>2</sup> Miller v. Tobacco Co., 2 McCrary  
C. C. 375.

The remedy for fraud and other irregularities in obtaining his discharge by a bankrupt must be sought by an application to the court in which the proceedings were had, to set the same aside, which said court may do under the bankrupt act.<sup>1</sup> The jurisdiction of the Federal courts under national bankrupt laws is exclusive; the proceedings of such courts come within the rule applied to judgments of courts of exclusive jurisdiction. When such court grants a discharge to a bankrupt (where it has jurisdiction), no other court, except one with authority to review its decisions, can in any way or for any cause declare such discharge invalid. The proceeding is in the nature of a judgment *in rem*, all the world are and become parties to it by the publication of the required notice. The only tribunal that can afford any relief is the court in which the discharge was granted.<sup>2</sup>

<sup>1</sup> Morris v. Creed, 11 Heik. 155, Smith v. Kinney, 6 Neb. 447, Smith v. Engle, 44 Ia. 265; Miller v. Chandler, 29 La. Ann. 88; Seymour v. Street, 5 Neb. 85; Smith v. Ramsey, 27 Ohio S. 339; Rayl v. Lapham, 27 Ohio S. 452; Thornton v. Hogan, 63 Mo. 143; Milhous v. Aircardi, 51 Ala. 594; Howland v. Carson, 28 Ohio S. 625; Livermore v. Swasey, 7 Mass. 218; Sheldon v. Newton, 3 Ohio S. 498; Goodrich v. Jenkins, 6 Ohio, 43; Anderson v. Anderson, 8 Ohio, 110; Voorhees v. Bank, 10 Pet. 449; Wright v. Watkins, 2 Greene (Ia.) 547; Brown v. Causey, 56 Tex. 340; Black v. Blazo, 117 Mass. 17; Wiley v. Paney, 61 Ind. 457; Thomas v. Jones, 39 Wis. 124; Benedict v. Smith, 43 Mich. 593; Blair v. Hanna, 87 Ind. 298; Marshall v. Sumner, 59 N. H. 218; S. C., 47 Am. R. 294.

<sup>2</sup> Shawhan v. Wheritt, 7 How. 627; Corey v. Ripley, 57 Me. 69; Whitehead v. Mallory, 4 Gray, 184; Delafield v. Freeman, 6 Bing. 294; Grant v. Lyman, 4 Met. 472; Gervis v. Canal Co., 5 M. & S. 78; Voorhees v. Bank, 10 Peters, 449; Hunt v. Ins. Co., 55 Me. 290; Rankin v. Goddard,

55 Me. 389; Nash v. Church, 10 W. 312; Kane v. Canal Co., 15 Wis. 179; Dudley v. Mayhew, 3 N. Y. 10; Millar v. Taylor, 4 Burr. 2305; Bank v. Olcott, 46 N. Y. 12; Linn v. Hamilton, 34 N. J. L. 305; Way v. Howe, 108 Mass. 503; Oates v. Parish, 47 Ala. 157; Parker v. Atwood, 52 N. H. 141; Dusenbury v. Hoyt, 53 N. Y. 521; Allstown v. Robinett, 9 B. R. 74; Archebrown, in re, 7 Ch. L. N. 99; Lamb v. Brown, 7 Ch. L. N. 364; Burnside v. Brigham, 8 Met. 75; Needham, in re, 1 Low. 309; Burpee v. Sparhawk, 108 Mass. 111; Stevens v. Bank, 101 Mass. 110; Symonds v. Barnes, 59 Me. 191; Mitchell v. Singletary, 19 Ohio, 291; Fox v. Paine, 10 Ala. 523; Payne v. Able, 7 Bush, 344; Brown v. Rebb, 1 Rich. L. 374; Randall v. Sutton, 2 Houst. 510; Hubbell v. Cramp, 11 Paige, 310; R. R. Co. v. R. R. Co., 20 Wis. 165; Brigham v. Claffin, 31 Wis. 607; Bryant v. Small, 35 Wis. 205; Hennessee v. Mills, 57 Tenn. 38; Bailey v. Caruthers, 71 Me. 172; Benedict v. Smith, 48 Mich. 593; Bank v. Olcott, 46 N. Y. 12; Blair v. Hanna, 87 Ind. 298.

§ 249. An adjudication in bankruptcy finally and conclusively settles all matters connected with the administration of the bankrupt's estate.<sup>1</sup> A discharge in bankruptcy is a complete bar to any suit brought against a bankrupt in a State court to enforce a debt which has been extinguished by that discharge<sup>2</sup> (provided it is so pleaded). But where the discharge is obtained after the rendition of a judgment against the bankrupt, and he has no opportunity to plead it, the defense is available upon a motion for leave to issue execution on such judgment when it becomes dormant.<sup>3</sup> Such a discharge is a bar to the claims of alien creditors suing in the courts of this country, in like manner as though they were citizens thereof.<sup>4</sup> It has a like effect as any judgment *in rem*, in a prize or admiralty cause; it binds the whole world. Where specifications of opposition to a discharge, filed by certain creditors, were pending in court for a year, then withdrawn, and the bankrupt discharged, a creditor, who was represented in the bankruptcy proceedings by the same solicitor who acted for the objecting creditors, will not be heard to assert personal ignorance before the granting of the discharge of the matters contained in said specifications, nor permitted to set them up as grounds for avoiding the discharge.<sup>5</sup>

§ 250. An adjudication in bankruptcy does not divest the State court of its jurisdiction of a pending suit. The bankrupt may have the proceedings stayed until his discharge is granted, when he may plead the same. If he does not, and allows judgment to go against him, the judgment will bind him, notwithstanding his discharge thereafter.<sup>6</sup> So, a verdict and judgment

<sup>1</sup> Blair v. Hanna, 87 Ind. 299; Wiley v. Pavey, 61 Ind. 457; Black v. Blazo, 117 Mass. 17; Smith v. Ramsey, 27 Ohio St. 339; Burpee v. Sparhawk, 108 Mass. 111.

<sup>2</sup> Miller v. Chandler, 29 La. Ann. 88; Dawson v. Hartsfield, 70 N. C. 334; Haskins v. Wall, 77 N. C. 219; Poillon v. Lawrence, 43 N. Y. Sup. 385; Pease v. Bennett, 17 N. H. 124; Humble v. Carson, 6 B. R. 84; Williams v. Atkinson, 37 Tex. 16; Flanagan v. Cary, 37 Tex. 67; Blum v.

Ellis, 73 N. C. 293; Withers v. Stinson, 79 N. C. 341; Wilson v. Kelly, 16 S. C. 216; Eberhardt v. Wood, 6 Lea, 467; Dow v. Davis, 73 Me. 288; but only in favor of the bankrupt; Dewey v. Moyer, 18 B. R. 114; Bowen v. Eichel, 91 Ind. 22; S. C., 46 Am. R. 574.

<sup>3</sup> Sanderson v. Daily, 83 N. C. 67.  
<sup>4</sup> Ruiz v. Eckerman, 2 McCrary C. C. 259.

<sup>5</sup> Douglass, in re, 11 F. R. 403.

<sup>6</sup> Boynton v. Ball, 105 Ill. 630.

for the defendant in an action on a contract, on the plea that he had been discharged as an insolvent debtor, will estop the plaintiff from disputing the discharge in an action on a contract between the same parties.<sup>1</sup> The act of Congress in relation to authentication of records does not relate to proceedings in Federal courts. A certificate of discharge in bankruptcy, signed by the judge and attested by the clerk, under the seal of the court, is not only sufficiently authenticated, but is precisely the means by which the bankrupt is to prove and to have the benefit of his discharge.<sup>2</sup> So the appointment of a provisional assignee in bankruptcy cannot be collaterally assailed.<sup>3</sup> A person who is a party to composition proceedings in a Federal bankruptcy court, who might have set aside the proceedings in that court cannot impeach the judgment collaterally in an action in the State court.<sup>4</sup> But where a United States court has no jurisdiction of the application for a discharge, such discharge is no defense to a creditor's suit in a State court.<sup>5</sup> Where a collateral attack is made to a discharge on the ground that notice was not given to a creditor, the presumption will be that notice by publication was duly given, that being a necessary and regular step in the cause. The doctrine applicable in cases where a court has jurisdiction, applies: "that no matter how irregular the proceedings may have been, they are not subject to a collateral attack," and the discharge is conclusive. It is held that only a willful and fraudulent omission to include a creditor's claim or demand in the petitioning debtor's schedules will avoid the discharge.<sup>6</sup> In such case a debtor will be estopped pleading in bar, in a suit in a State court, a discharge obtained *pendente lite*,

Steadman v. Lee, 61 Ga. 59; Everts v. Hyde, 51 Vt. 102; Hersey v. Jones, 138 Mass. 472; Miller v. Clements, 54 Tex. 351; S. C., 49 Tex. 16; S. C., 42 Tex. 1; Bradford v. Rice, 102 Mass. 473; Sampson v. Clark, 2 Cush. 173; Woodbury v. Perkins, 5 Cush. 86; Holden v. Sherwood, 94 Ill. 92; Mansfield, in re, 6 N. B. R. 303

<sup>1</sup> Merriam v. Whittemore, 5 Gray, 316.

<sup>2</sup> Miller v. Chandler, 17 N. B. R. 251.

<sup>3</sup> Raymond v. Morrison, 59 Iowa, 371.

<sup>4</sup> Way v. Howe, 108 Mass. 50; Burpee v. Sparhawk, 108 Mass. 111; Black v. Blazo, 117 Mass. 17; Bank v. Carpenter, 129 Mass. 1; Hersey v. Jones, 128 Mass. 473; Lewis v. Leonard, 5 Ex. D. 165; Wadsworth v. Pickles, 5 Q. B. D. 470; Farwell v. Raddin, 129 Mass. 7; Powers v. Bank, 129 Mass. 44

<sup>5</sup> Hennessee v. Mills, 57 Tenn. 38,

<sup>6</sup> Jones v. Knox, 51 Ala. 367.

where he fraudulently concealed from his creditor the pendency of the bankrupt proceedings until after discharge granted, and the creditor had no other notice of the pendency of the proceedings.<sup>1</sup>

§ 251. Where a plaintiff can recover prospective or general damages, the defendant cannot be vexed in a subsequent action. If a party can, or is entitled to recover damages for all injuries which had occurred previous to the commencement of the action, but also for all injuries which may thereafter accrue, the first recovery will be a bar to any future action from the same cause.<sup>2</sup> Thus, a judgment against a railroad company, for damages not limited to those actually suffered at the date of the writ, for locating and constructing their road on the bank of a river, so as to divert its course and cause it to wash away the plaintiff's land, is a bar to a like action for the subsequent damages arising from the same cause.<sup>3</sup> A proceeding by which the owner of a dam has acquired a license to raise the same (under a statutory provision), may be pleaded in bar of an action for damages for injuries subsequently arising from the raising of the dam, although the jury allowed no damages in the proceeding under which the license was obtained.<sup>4</sup> So, a recovery of damages for a breach of contract to employ is a bar to future actions for wages.<sup>5</sup> A defendant having once responded in damages for the negligent act, which is the foundation of the plaintiff's action, all liability for such act has been extinguished, and compensation therefor cannot be exacted a second time.<sup>6</sup> So, where a license is pleaded in an action brought for the erection of a nuisance, and found for

<sup>1</sup> Batchelder v. Low, 8 N. B. R. 571.

<sup>2</sup> Whitehurst v. Rogers, 38 Md. 503; Felter v. Beal, 1 Ld. Raymd. 339; Caldwell v. Murphy, 1 Duer, 233; Blount v. McCormick, 3 Denio, 283; Trask v. Hartford, &c. Co., 2 Allen, 331; Stodghill v. R. R. Co., 53 Iowa, 341; Gas Co. v. Howell, 92 Ill. 19; Kerr v. Simons, 9 Mo. App. 376.

<sup>3</sup> Fowle v. New Haven, &c., 107 Mass. 352.

<sup>4</sup> Watson v. Van Meter, 43 Iowa, 76.

<sup>5</sup> Thompson v. Wood, 1 Hilt. 93;

Wiseman v. R. R. Co., 1 Hill, 390; Routledge v. Hislop, 2 E. & B. 549.

<sup>6</sup> Fetter v. Beale, 1 Ld. Raymd. 339; Bonomi v. Backhouse, 27 L. J. Q. B. 390; Dibble v. R. R. Co., 23 Barb. 183; Hodso'l v. Stollebras, 11 A. & E. 301; Whitney v. Clarendon, 18 Vt. 252; Read v. R. R. Co., L. R. 3 Q. B. 553; Filer v. R. R. Co., 49 N. Y. 42; Curtis v. R. R. Co., 18 N. Y. 534; Drew v. R. R. Co., 26 N. Y. 49; McGovern v. R. R. Co., 67 N. Y. 417; Littlewood v. Mayor, 89 N. Y. 24; S. C., 42 Am. R. 271.

the plaintiff, the defendant is estopped from setting up the same defense in a subsequent suit for the continuance of the nuisance, and the only question for the jury is, whether the state of things remain the same or not.<sup>1</sup> Where the injury is of a continuing nature, the bringing of an action, and the recovery of damages, for the perpetration of the original wrong, does not prevent the injured party from bringing a fresh action for the continuance of the injury. Thus, if a building has been wrongfully erected upon the plaintiff's land, and he has brought an action and recovered damages for the trespass, he is not thereby estopped from bringing a new action and recovering additional damages for the continuance of the erection. So, if the defendant has thrown a heap of stones on the land of the plaintiff, and leaves them there, the defendant is responsible in trespass from day to day until they are removed.<sup>2</sup> The doctrine is, that where the injury is of a permanent character and goes to the entire value of the estate, the whole injury is suffered at once, and no other action can be maintained for the continuance of the injury. But where the wrong does not involve the entire destruction of the estate or its beneficial use, but may be apportioned from time to time, separate actions must be brought, and a former suit will be no bar for damages suffered subsequently to the institution of that suit.

§ 252. The rule that estoppels must be certain to every intent, and precise and clear, is peculiarly applicable to estoppels by record and judicial proceedings; and for this reason the record of a judgment must show with some degree of certainty the precise points determined, and not from inference or argument; and where it gives no indications at all of what particular matters were adjudicated, it leaves the question unsettled, and is not available either as an estoppel or anything else,<sup>3</sup> but merely evi-

<sup>1</sup> Kilheffer v. Herr, 17 S. & R. 319; Cornell v. Dakin, 38 N. Y. 353.

<sup>2</sup> Holmes v. Wilson, 10 A. & E. 503; Van Horzier v. R. R., 69 Mo. ; Shadwell v. Hutchinson, 2 B. & A. 97; Stone Co. v. R. R. Co., 53 Barb. 206; Thompson v. Gibson, 7 M. & W. 465; Staple v. Spring, 10 Mass. 74; Clowes v. Potteries Co., L. R., 8 Ch. App. 102; Beckwith v. Griswold, 29

Barb. 291; Vedder v. Vedder, 1 Denio, 257; Pinney v. Berry, 61 Mo. 367; Troy v. R. R. Co., 23 N. H. 82; Canal Co. v. Wright, 21 N. J. L. 469.

<sup>3</sup> Davis v. Brown, 94 U. S. 423; Aiken v. Clark, 23 Vt. 260; Hooker v. Hubbard, 103 Mass. 245; Burton v. Shaw, 14 Gray, 433; Wood v. Jackson, 8 Wend. 107; Smith v. Weeks, 26 Barb. 463; Ridgely v. Stillwell, 27

dence of its own existence. The conclusive effect of a judicial decision cannot be extended by argument or implication to matters which were not determined.<sup>1</sup> An estoppel by judgment is never inferred unless the basis on which it rests is such as to lead to the conclusion that the whole subject was litigated and adjudicated. Evidence *aliunde* to explain a record is therefore admissible, and often becomes a necessity. Whether any matters have been tried between the same parties is a fact depending partly on parol testimony and partly on the record. Thus, a judgment for the plaintiff on a petition containing several counts, is not conclusive of the existence or validity of the contract set forth in the special count.<sup>2</sup> In a case<sup>3</sup> in the United States Supreme Court, Justice Nelson, in delivering the opinion of the court, said: "The court, when the case came up on error, agreed that the record was properly admitted as evidence of the former trial between the parties, but held that the pleadings, verdict and judgment did not furnish the necessary proof, to show that the contract in controversy in the suit then on trial had been before agitated, and conclusively adjudicated in the former trial on behalf of the plaintiffs; that the verdict had been rendered upon the entire declaration, and without special reference to the first count." The record, with the pleadings and verdict, furnished evidence that the same matters might have been litigated on that trial, and afforded ground for the introduction of extrinsic evidence to show that the same contract had been in contest before the court, and had been referred to the jury, but nothing more. For this reason the judgment was reversed and a new trial ordered. Taking this view of the application and effect of the record of the former trial, the plaintiffs introduced extrinsic evidence, and have endeavored to prove the necessary facts which, in connection with the record, would lead to the conclusion that the same

Mo. 128, *Callow v. Jenkinson*, 5 E. L. & Eq. 533; *Russell v. Place*, 94 U. S. 606; *Bank v. Eldred*, 6 Biss. 370.

<sup>1</sup> *Chamberlain v. Gaylord*, 26 Ala. 504, *Mallet v. Foxcraft*, 1 Story, 474; *Imhsen v. Ormsby*, 32 Pa. St. 198, *Bennett v. Holmes*, 1 D. & B. 486, *White v. Chase*, 128 Mass. 158; *Kezar v. Elkins*, 53 Vt. 119; *Fendall v. U.*

*S.*, 14 Ct. of Cl. 247; *Felton v. Smith*, 88 Ind. 149; *Smith v. Smith*, 79 N. Y. 634; *Merch. Line v. Lyon*, 12 F. R. 63, *Spooner v. Davis*, 7 Pick. 147; *Teal v. Terrell*, 48 Tex. 491.

<sup>2</sup> *Packet Co. v. Sickles*, 24 How. 533.

<sup>3</sup> *Packet Co. v. Sickles*, 5 Wallace, 593.

contract was in controversy in the former suit, and had been conclusively adjudged in their favor. But this extrinsic evidence was open to be controverted on the part of the defendants, as the record itself did not furnish evidence of the finding of the existence or validity of the contract in the former suit, and hence extrinsic proof was required; to this effect it was of course competent for the defendants to deny and disprove both, as in so doing they did not impeach the record, but only sought to disprove the evidence introduced by the plaintiffs. The declaration in the former suit contained four counts, to which the general issue was pleaded, and a general verdict for the plaintiffs. The first and fourth counts set up two different special contracts relating to the same subject-matter, and which constituted the cause of action between the parties. Now, the extrinsic evidence furnished on the part of the plaintiffs as to the former trial and the grounds of proceeding therein, tended to prove either count, and was sufficient to have justified the jury in finding either contract. These contracts, as thus set forth, were identical, with the exception of the agreement to settle the proportion of fuel saved by an experiment. The jury, therefore, might have found in favor of the plaintiffs on the contract as set forth in the fourth count, even if they disbelieved the proof of the agreement as to the mode of settling the proportion of fuel saved. As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties; when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record does not show that the matter was necessarily and directly found by the jury, evidence *aliunde*, consistent with the record, may be received to prove the fact; but even where it appears from extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the ver-

dict and judgment necessarily involved its consideration and determination, it will not be concluded.<sup>1</sup>

Thus, in a case which was an action at law for damages for the infringement of a patent for an alleged new and useful improvement in the preparation of leather, which patent contained two claims—one for the use of fat liquor generally in the treatment of leather, and the other for a process of treating bark-tanned lamb or sheepskin, by means of a compound composed and applied in a particular manner—the declaration alleged, as the infringement complained of, that the defendants had made and used the invention, and caused others to make and use it, without averring whether such infringement consisted in the simple use of fat liquor in the treatment of leather or in the use of the process specified. The court held that the judgment recovered in the action does not estop the defendant, in a suit in equity by the same plaintiff, for an injunction and an accounting for gains and profits, from contesting the validity of the patent, it not appearing by the record, and not being shown by extrinsic evidence, upon which claim the recovery was had. The validity of the patent was not necessarily involved, except with respect to the claim which was the basis of the recovery; a patent may be valid as to a single claim, and invalid as to the others. If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.<sup>2</sup> The evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration, and then the record furnishes the only proper proof of the verdict.<sup>3</sup>

§ 253. A verdict and judgment for the defendant in trover or trespass *de bonis asportatis*, cannot be pleaded as an estoppel

<sup>1</sup> Hill v. Morse, 61 Me. 541; Strother v. Butler, 17 Ala. 733; Cromwell v. Sac, 94 U. S. 351; Brown v. Davis, 94 U. S. 423; Aiken v. Peck, 22 Vt. 260; Hooker v. Hubbard, 102 Mass. 245; Wood v. Jackson, 8 Wend. 9; Packet Co. v. Sickles, 24 How. 333; S. C.,

5 Wall. 592; Lawrence v. Hunt, 10 Wend. 80; Brenner v. Bigelow, 8 Kans. 496.

<sup>2</sup> Russell v. Place, 94 U. S. 606.

<sup>3</sup> Wood v. Jackson, 8 Wend. 9; Hitchin v. Campbell, 2 Blacks. 827; Packet Co. v. Sickles, 5 Wall. 592.

in a subsequent action for the same goods, with the aid of proper allegations, for the reason that the jury may have been of the opinion that the defendant did not take the goods, not that they did not belong to the plaintiff.<sup>1</sup> So in an action for replevin, where a plaintiff took several chattels from the possession of the defendant, and recovered final judgment for part of them only, on a trial in which the whole was contested. In a subsequent action of replevin brought to regain possession of the residue of the chattels by him from whose possession they had been so taken, he cannot be permitted to allege title and prove it by the same evidence by which he endeavored to prove title to the same property on a former trial and failed. The effect of a verdict, where the answer put in issue the allegations of the complaint, is not necessarily conclusive that the plaintiff has no title to the property, for the reason that it may have been found that the plaintiff did not wrongfully detain. Its effect, therefore, depends upon extrinsic evidence; but where the property was taken from the defendant's possession, and it is proved that the title was in fact in question, and the subject of the contest on the former trial, the verdict therein is conclusive, where no new right has been since acquired.<sup>2</sup> A judgment in a replevin suit is a bar to an action of trespass, for the taking the same goods, the original cause of action being merged in the judgment. Such merger is not merely of the part brought directly in question in the suit in which the first judgment is recovered, but of the entire cause of action, regardless of the question whether or not the party suing had recovered all which he had the election to bring,<sup>3</sup> and is conclusive as to the ownership in an action between the same parties to recover the value of the goods.<sup>4</sup> Issues tried and determined in a replevin suit cannot be again presented in an action on the replevin bond.<sup>5</sup> If the right of property has

<sup>1</sup> *Bennett v. Holmes*, 1 Dev. & Bat. 486; *Long v. Baujas*, 2 Ired. 290; *Angel v. Hollister*, 38 N. Y. 378; *Gates v. Fassett*, 5 Denio, 21; *Harris v. Miner*, 28 Ill. 139.

<sup>2</sup> *Owens v. Rawleigh*, 6 Bush, 656.

<sup>3</sup> *Savage v. French*, 13 Ill. App 17; *Karr v. Bristow*, 24 Ill. 580; *Bennett v. Hood*, 1 Allen, 47; *Stanley v. Gaylord*, 1 Cush. 545; *Coffin v. Knott*, 2

*Greene (Iowa)* 582; *Gibbs v. Cruikshank*, L. R. 8 C. P. 454; *Pease v. Chaytor*, 1 B. & S. 658; *Hardin v. Paimlee*, 28 Minn. 450.

<sup>4</sup> *Claffin v. Fletcher*, 10 Biss. 281.

<sup>5</sup> *Denney v. Reynolds*, 24 Ind. 248; *Wallace v. Clark*, 7 Blackf. 298; *Hawley v. Wainer*, 13 Iowa, 42; *Witter v. Fisher*, 27 Iowa, 9

been tried, it becomes *res judicata*. So where the question of title to the property is passed upon, and a judgment is rendered against the plaintiff, such judgment bars an action against the officer for the same property,<sup>1</sup> and where the action is in his favor the defendant can not maintain an action for a wrongful taking.<sup>2</sup> Where the title to the property is put in issue and the defendant proves his right to it, and the court renders judgment determining the whole controversy, such adjudication is conclusive as to all the issues involved, especially if the plaintiff has not acquired any title since the former action.<sup>3</sup> If the question at issue is the mere right of possession, and the court orders a return of the property, it is not conclusive. The return of the goods, whether the damages are paid or not, is a satisfaction for the trespass, and bars an action therefor.<sup>4</sup> If the defendants recover a judgment for the property, and subsequently collect it, such judgment and satisfaction, by operation of law, transfer the title to the property to the plaintiff; and in an action for taking and carrying away the property, the defendant will be estopped from disputing his title.<sup>5</sup> So where a defendant in an action of replevin pleaded a former recovery from the plaintiff of the property in question, and offered a judgment in evidence. The description of the property in the judgment varied from that in the plaintiff's complaint; parol evidence was admitted to show that it was the same property.<sup>6</sup>

§ 254. A verdict and judgment are conclusive by way of estoppel only as to facts, without the existence and proof or admission of which they could not have been rendered.<sup>7</sup> In

<sup>1</sup> Kreuchli v. Dehler, 50 Ill. 176.

<sup>2</sup> Ewald v. Waterhout, 37 Mo. 603.

<sup>3</sup> Hayden v. Anderson, 17 Iowa, 158; McKinzie v. Baltimore, &c. Co., 28 Md. 166; Wells v. McCleuning, 23 Ill. 409; Carleton v. Davis, 8 Allen, 94; Patton v. Hammer, 33 Ala. 307; Lacon v. Barnard, Cro. Car. 35; Ferrers v. Arden, 2 Vent. 668; Lechmere v. Toplady, 2 Vent. 169.

<sup>4</sup> Karr v. Bristow, 24 Ill. 580.

<sup>5</sup> Russell v. Gray, Barb. 541.

<sup>6</sup> Gates v. Bennett, 33 Ark. 475.

<sup>7</sup> Burien v. Shannon, 99 Mass. 200;

Lea v. Lea, 99 Mass. 493; Tuska v. O'Brien, 68 N. Y. 446; Foster v. Busted, 100 Mass. 409; Wildes v. Russell, L. R. 1 C. P. 722; Huffer v. Allen, L. R. 2 Exchq. 15; Heroman v. Louisiana Ins. Co., 34 La. Ann. 805; Leonard v. Whitney, 109 Mass. 265; Crofton v. Cincinnati, 26 Ohio S. 571; Dunham v. Bower, 77 N. Y. 76 S. C., 33 Am. R. 570; Woodgate v. Fleet, 44 N. Y. 1; Hardy v. Mills, 35 Wis. 141; Hammer v. Pounds, 57 Ala. 318; Supples v. Cannon, 44 Conn. 424.

order that a judgment shall be conclusive, it must appear by record, or by some sufficient means of proof, that the title was actually drawn in controversy and decided.<sup>1</sup> Between parties and privies it is not necessary that the record should show the question upon which the right of the plaintiff to recover depended, for it to operate conclusively, but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material and was in fact contested, and that it was referred to the decision of the jury. The rule is, that to render such former judgment conclusive, it is only necessary to show that the same matter might have been decided and actually was decided;<sup>2</sup> but the rule seems to be that while it is not conclusive, but *prima facie* evidence, the onus is on the party against whom the record is used to prove to the contrary.

§ 255. A judgment dismissing the complaint on the ground that a material element of the cause of action was wanting, is a bar to another action. Thus, in an action on a recognizance, a judgment finding that the recognizance was never filed, and that the recognizance was necessary to sustain an action thereon, is a bar; for it shows that the merits of the controversy were litigated, submitted and decided. To sustain a recovery in another action, it would be necessary to find that the conclusions of the former judgment were not true in point of fact, and this it is not competent to do as long as the former judgment is unreversed and remains in full force and effect.<sup>3</sup> Thus, a judgment that "the plaintiff failing to reply to the first and second pleas of the defendant, filed herein on the calling of the cause for trial, it is ordered that this suit be dismissed at the costs of said plaintiff," was held, though informal, a complete bar to the cause of the action, the pleas being valid pleas in bar.<sup>4</sup> The dismissal of a suit for want of prosecution determines everything involved in it, and, so far as the particular action is concerned, is the same as a judgment for the defendant on the merits.<sup>5</sup> So a judgment of non-

<sup>1</sup> Parker v. Hotchkiss, 25 Conn. 320.

<sup>2</sup> Keene v. Clark, 5 Robertson, 88; Thompson v. McKinley, 47 Pa.St. 353.

<sup>3</sup> People v. Smith, 51 Barb. 360.

<sup>4</sup> Campbell v. Mayhugh, 15 B. Mon. 142; People v. Smith, 51 Barb. 360.

<sup>5</sup> Dowling v. Polack, 18 Cal. 625; Leese v. Sherwood, 21 Cal. 15.

suit or retraxit dismissing plaintiff's complaint is a bar to a second proceeding to enforce the same claim.<sup>1</sup> So, an order dismissing a suit agreed bars any other suit between the same parties, on the cause of action thus adjusted by them, and merged in the judgment of a court at their instance.<sup>2</sup> The legal deduction from dismissing a suit by agreement is that the parties had by their agreement adjudicated the subject-matter of controversy in that suit, and the legal effect of such judgment is, therefore, that it will operate as a bar to any other suit, between the same parties, on the identical cause of action then adjusted by the parties and merged in the judgment thereon, rendered at their instance and in consequence of their agreement. So, the dismissal of a bill for divorce for the cause of adultery, on the ground that the adultery was not proved. The judgment is conclusive evidence in favor of the wife, in a subsequent proceeding in divorce between the parties, that the alleged act was not committed, and estops the husband from litigating the same issue.<sup>3</sup> Thus, a non-suit ordered by a justice, must be regarded, after a trial on the merits, as a judgment for the defendant, and consequently a bar in any other litigation between the same parties, even though the order was made with the consent of the plaintiff.<sup>4</sup> So, where a petition for a highway had been dismissed by the court, a subsequent act of the legislature made certain evidence admissible, which was not on the consideration of that question before admissible. It was held that a new petition for the establishment of substantially the same highway, though signed by different parties, was barred by the former judgment.<sup>5</sup> The instances cited sustain the principle that, while a judgment may be a bar, yet it need not be an adjudication upon all the matters in controversy, that a judgment of dismissal may be as conclusive as one rendered after a *litis contestatio*.

<sup>1</sup> Sullivan v. Brewster, 1 E. D. Smith, 618; English v. Scott, 1 Mo. 495; Armory v. Armory, 26 Wis. 152; Coffman v. Brown, 15 Miss. 125; Dixon v. Sinclair, 4 Vt. 354; Leese v. Sherwood, 21 Cal. 15.

<sup>2</sup> Jarboe v. Smith, 10 B. Mon. 257; Bank, &c. v. Hopkins, 2 Dana, 395; Philpots v. Blaisdell, 10 Nev. 19; Merritt v. Cambell, 47 Cal. 542,

Hoover v. Mitchell, 25 Gratt. 387.

<sup>3</sup> Lewis v. Lewis, 106 Mass. 309; Lea v. Lea, 99 Mass. 493; Commonwealth v. Evans, 101 Mass. 25; Thurston v. Thurston, 99 Mass. 39; Merriam v. Whittemore, 9 Gray, 316; Burden v. Shannon, 99 Mass. 200.

<sup>4</sup> Gillilan v. Spratt, 8 Abb. P. N. S. 13

<sup>5</sup> Terry v. Waterbury, 35 Conn. 526.

§ 256. It is said that mere dismissal for want of prosecution is no more than a nonsuit at law, and therefore concludes nothing against the party or his privy.<sup>1</sup> The soundness of this rule may be doubted upon the ground that where a party, after instituting an action, and having cited the party and discovered his defense, refuses to prosecute his action against the defendants, it is a virtual and silent confession in an impartial, judicial tribunal that he has no cause of action, and submits to a final judgment of the court, which judgment of dismissal carries costs with it. And if the complainant desires to reserve the right of a future action the dismissal must be "without prejudice," or the presumption should be that it was on the merits. It is trifling with justice to allow a party to bring as many actions as he may see fit to, simply because he pays the costs. The maxim, *nemo debet bis vexari* applies, and therefore a judgment or decree dismissing a suit *without any reserve for its renewal* is not a judgment of nonsuit; it is final, and as *res judicata* it concludes the parties.<sup>2</sup> So, a judgment of dismissal rendered on the application of either party, with the consent of the other, amounts to an open and voluntary renunciation of the plaintiff's suit, which is a bar to another suit subsequently brought upon the same cause of action,<sup>3</sup> or a dismissal of a bill in chancery. The recovery of a judgment by an assignee of a cause of action is conclusive on the question whether the cause of action was assignable.<sup>4</sup> So, a recovery upon a partnership contract merges the debt, and a judgment against one partner constitutes an estoppel in a subsequent action for the same breach against his copartners.<sup>5</sup>

§ 257. In order to render a decree or judgment conclusive against a party, it need not be against him by name; it is enough

<sup>1</sup> Ball v. Ball, 2 Fox and Smith, 249; Foster v. Busteed, 100 Mass. 409; Burlen v. Shannon, 99 Mass. 500; Baird v. Bardwell, 60 Miss. 164; Porter v. Vaughan, 26 Vt. 624; Rosse v. Rust, 4 Johns. Ch. 300; Morrell v. Matthews, 1 Miss. 377.

<sup>2</sup> Bledsoe v. Erwin, 33 La. Ann. 615; Granger v. Singleton, 32 La. Ann. 898; Best v. Hoppie, 3 Cal. 137.

<sup>3</sup> Bank v. Hopkins, 2 Dana, 395; Jarboe v. Smith, 10 B. Mon. 257;

Merritt v. Campbell, 47 Cal. 542; Philpots v. Blasdell, 10 Nev. 19; Schoch v. Foreman, 3 Brews. 157; Newark v. Newark, 22 Mich. 292; Lufft v. Allen, 55 Ill. 393; Howell v. Goodrich, 69 Ill. 556; Ogburg v. La Farge, 2 N. Y. 113; Innis v. Roane, 4 Call, 379; Byrne v. Fiere, 2 Molloy, 157.

<sup>4</sup> Richtmeyer v. Remsen, 38 N. Y. 206.

<sup>5</sup> Tinkum v. O'Neel, 5 Nev. 93.

if it be against his interest.<sup>1</sup> Where a writ is issued and there is a mistake in the name of the party upon whom it is to be served, or it is served on the party by a wrong name, and such party fails to appear and plead the misnomer in abatement, but allows a judgment to be rendered against him, he is concluded by such judgment as effectually as though he was properly named therein, and he may be connected with such judgment in any future litigation by proper allegations that he was the party.<sup>2</sup> Thus, where there was an appearance of the defendant under a mistaken name, and the decree was entered against her. She is bound by the decree, no matter what her real name is. Parol evidence is admissible to identify the parties.<sup>3</sup> So where a complaint did not give the surname of the defendant, but only his first Christian name and the initials of his middle name. In the affidavit appended to the complaint, the defendant's name was given in full. He appeared to the suit, pleaded and filed several papers in the case, giving his name in full, and describing himself as said defendant. It was held that the defendant was estopped from setting up the misnomer in the complaint, and that objection to such misnomer could only be taken by plea in abatement, and not by demurrers,<sup>4</sup> and he is bound by the judgment. This principle of conclusiveness is inflexible, and will not yield to circumstances or the hardship attendant upon its application in the particular instance. A judgment for the defendant on the plea of *nul tiel record* to an action of debt on a judgment, is conclusive, even where the failure of the plaintiff arises from having the judgment defectively authenticated or certified, and the validity of the judgment is beyond dispute.<sup>5</sup>

The conclusiveness of a former judgment can not be overthrown by proof that it was procured by fraud or the subornation of witnesses,<sup>6</sup> or that the cause of action originated in a fraud that was not

<sup>1</sup> Taylor v. Cornelius, 60 Pa. St. 187.

<sup>2</sup> Ins. Co. v. French, 18 How. 409; Bank v. Jaggars, 51 Md. 38; Guinaud v. Huysinger, 15 Ill. 288; Barry v. Carothers, 6 Rich. L. 331; Smith v. Bowker, 1 Mass. 75; Smith v. Patton, 6 Taunt. 115; Crawford v. Satchwell, 2 Str. 1216; Oakley v.

Giles, 3 East, 168; State v. Burtis, 34 Mo. 92.

<sup>3</sup> Carmichael v. Van Duberg, 13 W. J. 276.

<sup>4</sup> Rich v. Boyce, 39 Md. 314.

<sup>5</sup> Foltz v. Proutz, 15 Ill. 434; Price v. Dewey, 6 Sawyer, 493.

<sup>6</sup> Dement v. Lyford, 27 N. H. 541; R. R. Co. v. Sparhawk, 1 Allen, 448;

discovered until after the rendition of the judgment.<sup>1</sup> The only relief a party can obtain is in equity, under circumstances similar to those hitherto mentioned; and as this principle of conclusiveness affects privies, as well as parties, a vendee cannot set up a defense in a suit upon a mortgage which has been previously decided against the vendor, or where a point which has been decided on the merits, in a suit at law, is again brought into question on the same grounds in equity.<sup>2</sup> The same principle applies where the judgment is rendered by arbitrators,<sup>3</sup> or under a bill in equity, and bars a renewal of the controversy either there or at law.<sup>4</sup> Thus, a vendee who has covenanted to convey other land, as soon as certain incumbrances on the land conveyed to him were removed by the vendor, is estopped from pleading a failure to remove them, as a bar to the covenant, by a prior decree in equity directing that the incumbrances should be discharged by him out of the purchase money due to the vendor, with the same effect as if they had been paid by the latter,<sup>5</sup> but it applies only where both jurisdictions are concurrent; and a judgment at law will not estop the defendant from seeking relief on equitable grounds in chancery,<sup>6</sup> or the dismissal of a bill, for want of jurisdiction in chancery, cut the plaintiff off from obtaining redress at a suit of law.<sup>7</sup>

§ 258. The effect of verdicts and judgments, whether upon parties or privies, depends upon the question whether the same point was in issue.<sup>8</sup> A verdict between two parties on one question can certainly have no binding effect in an issue joined

Smith v. Lewis, 8 Johns. 137; Smith v. Lowry, 1 John. Ch. 322; Luttrell v. Fisher, 11 Heisk. 101.

<sup>1</sup> Homer v. Fish, 1 Pick. 435; Dugan v. McGlann, 60 Ga. 353.

<sup>2</sup> Kingsland v. Spalding, 3 Barb. Ch. 341; Simpson v. Hart, 1 Johns. 91; Hemstead v. Conway, 6 Ark. 317; Hendrickson v. Norcross, 10 N. J. Eq. 417; Baldwin v. McCrea, 38 Ga. 650; Adams v. Barnes, 17 Mass. 370; Morgan v. Barker, 26 Vt. 602.

<sup>3</sup> Buck v. Spofford, 35 Maine, 526; Bower v. Sullivan, 5 W. & S. 536.

<sup>4</sup> Jackson v. Hoffman, 9 Cow. 271;

Montford v. Hunt, 3 W. C. C. 28; Babcock v. Camp, 12 Ohio S. 11; Kelsey v. Murphy, 26 Pa. St. 78; U. S. v. Beverly, 1 How. 135; Parker v. Kane, 22 How. 1; Bigelow v. Winsor, 1 Gray, 299.

<sup>5</sup> Marriott v. Hampton, 7 T. R. 269; Aslin v. Parkin, 2 Burr. 665; Rex v. St. Pancras, Peake, 219; Hopkins v. Lee, 6 Wheat. 109.

<sup>6</sup> Arnold v. Greene, 2 Iowa, 1; Hobbs v. Duff, 23 Cal. 596.

<sup>7</sup> Lore v. Newman, 10 Ohio S. 45.

<sup>8</sup> Brady v. Prior, 69 Ga. 691; Henry v. Davis, 13 W. Va. 230.

between them on another question, nor will the judgment be admissible unless it clearly appears that the same point was actually in issue and was determined in the former action. Thus, an action for a deliberate and intentional fraud practiced by a person in making a sale, may be maintained against him personally, even though he acted as agent of another in making the sale; and it makes no difference that the plaintiff has already sued the seller for a breach of warranty and has been defeated in such action. Had he recovered in the first action and got his damages, he might be estopped, but where he fails by reason of having no cause of action on the warranty, he may still have a good cause of action for the fraud, which has never been determined. So, where one contract contains several covenants, an action for breach of one is not necessarily a bar to a subsequent action for breach of another, although the two relate in part to the same subject-matter, as in covenants to build a fence, and also to keep the buildings and fence in repair.

§ 259. In order to preclude a second action for items which might have been embraced in the first, the true question is not, whether allowing separate actions to be maintained for separate items would lead to a multiplicity of suits or would operate oppressively, but whether the former action was for the identical cause or demand for which the subsequent one was brought. One method of ascertaining whether the subject-matter or cause of action is the same as in a former suit is, to inquire whether the same evidence would sustain both actions, and, although the former action is changed, if the same matter is determined, the former judgment is admissible in evidence upon the subsequent trial.<sup>1</sup> A judgment for the defendant in trespass, when the right of property is determined, will be effectual as an estoppel in an action of trover for the same taking. And if execution is sued out is a bar to a suit by the same plaintiff against another person for taking the same goods. So, a judgment for the de-

<sup>1</sup> *Perry v. Lewis*, 49 Miss. 443; *Stowell v. Chamberlain*, 60 N. Y. 372; *Turner v. Allen*, 66 Ind. 252.

<sup>2</sup> *Ewald v. Waterhout*, 37 Mo. 602; *Smith v. Gibson*, Hard. 319; *Buckland v. Johnson*, 15 C. B. 163, *Caston*

*v. Perry*, 1 Bail. 533; *Moore v. Watts*, 1 Ld. Raym. 614; *Voght v. Winch*, 2 B. & A. 662; *Overton v. Harvey*, 9 C. B. 324; *Steinbach v. Ins. Co.*, 77 N. Y. 498.

fendant in trover is a bar in an action for money had and received for the wrong arising from the sale of the same goods,<sup>1</sup> and this, though the former action was against the creditor and sheriff, and the latter against the creditor alone. Where a court, in a former action between the same parties, had jurisdiction over the subject and the parties, and the questions of fact are the same as in the subsequent action, and were necessary to its decision, and either was or might have been litigated in that suit, and the final hearing was upon its merits, the judgment is *res adjudicata* as to all those things that were, or under the pleadings might have been, controverted in that action. Thus, the defendant, a New York corporation, insured the plaintiff at Baltimore, Maryland, against fire, on "his stock of fancy goods, toys, and other articles in his line of business, contained in his store occupied by him as a general jobber and importer." The policy contained a condition against storing or keeping hazardous, extra hazardous, or specially hazardous articles in the second class of hazards annexed to the policy, and that during the time of such storing or keeping the policy should be of no effect. "Fire-crackers in packages" were classed as hazardous No. 2 in the second class, and fireworks were classed as specially hazardous. There was a written permission "to keep fire crackers on sale," but no express permission to keep fireworks. The plaintiff kept fireworks, and a fire originated from them. The plaintiff sued to recover for the loss in a Baltimore court, the cause was removed to the United States court, and on the trial the court held that the policy prohibited keeping fireworks, and rejected proof to show that they constituted an article in the line of business of a "German jobber and importer," and gave judgment for defendant. This was affirmed by the United States Supreme Court. Before that action the plaintiff had sued the Lafayette Fire Insurance Company in the New York Supreme Court on a similar policy on the same stock and had recovered, and on appeal the evidence rejected in the United States court was held competent, and the appellate courts refused to be bound by the rule laid down in the United States Supreme Court. Plaintiff then brought this action to reform the policy by inserting permission to keep fireworks, on the ground that it was omitted by mistake, and to recover on

<sup>1</sup> Bank v. Rude, 23 Kans. 143.

the policy so reformed. The judgment of the United States Supreme Court was held to be a bar to this action. The test whether the second suit is founded substantially on the same cause of action as the first, is that the same evidence would support both. It matters not that the former action was erroneously decided. Whatever was necessarily decided in the first concludes the parties. The ground of recovery in the first case was the permission to keep fireworks, and that is the ground in this. In that it was sought to prove it by parol; here by the reformed writing. The reformed contract would be the same contract. The only difference would consist in direct written proof of what would otherwise rest upon construction or parol evidence. The former judgment determined that the contract was such as was embraced in the policy, proved in that action, and that plaintiff had violated it by keeping fireworks. Now he seeks to establish that such was not the contract, and that the real contract was not violated. He then gave all the proof he could to recover for the loss; now he seeks to recover for the same loss without alleging more than one contract, title or right. Having elected to sue on the contract as it was, he must abide the result.

§ 260. A judgment in favor of several defendants in one action is a bar to an action in another form against one of those defendants alone. Thus, the assignees of an insolvent debtor brought a bill in equity, to set aside conveyances of the property made by the debtor to the defendant, as made and taken either without consideration and in fraud of creditors, or by way of unlawful preference, contrary to the insolvent laws, charging the defendants, in the common form, with combining and confederating with divers other persons to the plaintiffs unknown, and praying for relief against the defendants jointly and severally; and the court, after a hearing upon the merits, decreed that the demands, set up by the defendants in their several answers, were justly due them from the insolvent, and that the conveyances of property in payment thereof were not made in violation of the insolvent laws, and dismissed the bill. *Held*, that this decree

<sup>1</sup> Washburn v. Ins. Co., 14 Mass. 175; Steinbach v. Ins. Co., 77 N. Y. 498.

was a bar to an action of trover by the assignees, for the same property, against one of the defendants in a suit in equity.

§ 261. A judgment or decree in an action for the partition of lands has the same force and effect as a bar to another action involving the same matters, as a judgment rendered on a promissory note or other cause of action.<sup>2</sup> It is conclusive upon the entire title, if all proper parties who are in being are joined in a proceeding for partition, notwithstanding it may be possible that some persons may afterwards be born who would be entitled to an interest,<sup>3</sup> as the parties are bound, so are all who claim by, from under, or through such parties, as grantees, heirs, assignees, and all privies.<sup>4</sup> In order that the judgment may have this conclusive effect, the court must have jurisdiction over the parties and the subject-matter. The court determines the rights, titles and interests of all the parties in the lands, so far as they appear, and makes the judgment conclusive upon all parties named, and all persons interested in the lands who may be unknown, and who have been served with notice, either personally or by publication, and all persons claiming under them. Thus, a judgment in a partition suit, to which certain persons are made defendants by name, and others as unknown owners, in the absence of any fraud or collusion, is conclusive upon a person thus made defendant as an

<sup>1</sup> *Bigelow v. Winsor*, 1 Gray, 299; *Bagot v. Williams*, 3 B. & C. 235; *Nelson v. Couch*, 15 C. B. N. S. 99; *Stowell v. Chamberlain*, 60 N. Y. 272.

<sup>2</sup> *Flagg v. Thurston*, 11 Pick. 431; *Ihmsen v. Ormsby*, 32 Pa. St. 200; *Foxcroft v. Barnes*, 20 Me. 129; *Rapp v. Aiken*, 2 McC. Ch. 125; *Clapp v. Bromagham*, 9 Cow. 530; *Dixon v. Waider*, 8 Jones L. 450; *Herr v. Herr*, 5 Pa. St. 423; *Burghardt v. Van Deusen*, 4 Allen, 375; *Edson v. Munsell*, 12 Allen, 600; *Cole v. Hill*, 2 Hill, 637; *Doolittle v. Don Maus*, 34 Ill. 547; *Whittemore v. Shaw*, 8 N. H. 393; *Godfrey v. Godfrey*, 17 Ind. 6; *Wright v. Dunning*, 46 Ill. 271; *Pentz v. Keuster*, 41 Mo. 450; *McBain v. McBain*, 15 Ohio S. 337; *Taylor v. Wise-*

*man*, 2 Ohio S. 210; *Foider v. Davis*, 38 Mo. 107; *Loomis v. Riley*, 24 Ill. 307.

<sup>3</sup> *Brevoort v. Brevoort*, 70 N. Y. 136; *Blakely v. Calder*, 15 N. Y. 617; *Clemens v. Clemens*, 37 N. Y. 59; *Wills v. Slade*, 6 Ves. 498; *Gaskell v. Gaskell*, 6 Sim. 643; *Cheesman v. Thorn*, 1 Ed. Ch. 629; *Bodine v. Greenfield*, 7 Paige, 634; *Jordan v. Van Epps*, 85 N. Y. 427.

<sup>4</sup> *Loomis v. Riley*, 24 Ill. 307; *Milican v. Milican*, 24 Tex. 426; *Tallman v. McCarty*, 11 Wis. 401; *Archibald v. Davis*, 4 Jones L. 133; *Pentz v. Keuster*, 41 Mo. 447; *O'Neal v. Duncan*, 4 McCord 246; *Jenkins v. Fahey*, 73 N. Y. 355; *Herndon v. Moore*, 18 S. C. 339.

unknown owner, both as to the nature and amount of his interest in the land, even though he was in possession of a part of the land at the commencement, claiming to hold it in severalty, by a title paramount to that of the parties named in the suit, and had no actual notice of the commencement or pendency of the suit: and he is estopped from contesting the title of the other parties to the shares awarded them by such judgment.<sup>1</sup> So, where a widow, on a bill filed by her on partition of her husband's estate, allows it to be partitioned, and takes herself, as part of his estate, a tract of land which, on partition, in her husband's life time, of her father's estate, had been allotted to her husband and herself and her heirs, with a direction that her husband should pay to other heirs of her father an excess in the value over her share, she, or her representative, is thereby barred from afterwards claiming, from her husband's estate, the value of her inheritance in said tract of land.<sup>2</sup> So, a party may waive his right to question the jurisdiction of the court or the title. Thus, the neglect of the respondent in an action pending in a probate court to make any question about the title, until after the appointment of the commissioners to make partition, is a waiver of the question, and it is then too late to dispute the title set forth so as to oust the court of jurisdiction.<sup>3</sup> Where an adult co-tenant of lands joins in a petition for the sale thereof, and such petition alleges that the legal title to the lands is in the infant co-tenants, and a sale is made in pursuance of such petition, the order of sale thus made will estop such adult from questioning the title of the purchaser of the lands at such sale.<sup>4</sup> The deed is made by the sheriff under an order of sale in partition, and is the act of the parties themselves, and a purchaser at such a sale is regarded as a grantee. The transfer to the purchaser is a complete extinguishment of the title of the parties to the action.<sup>5</sup> Where a widow is made a party to a proceeding in partition of the realty of her late husband, and, having appeared, suffers to be included in such partition realty to which she has title in her own right, and assents to the decree in partition, disposing of the same, she

<sup>1</sup> Nash v. Church, 10 Wis. 303.

<sup>3</sup> Ela v. McCornnihe, 35 N. H. 279.

<sup>2</sup> Barnes v. Cunningham, 9 Rich. Eq. 475; Larrabee v. Rideout, 45 Me. 193.

<sup>4</sup> Wood v. Mather, 38 Barb. 473.

<sup>5</sup> Pentz v. Keuster, 41 Mo. 447; O'Neal v. Duncan, 4 McCord. 246.

will not be permitted to set up her title to the realty as against one claiming by virtue of the allotment in partition.<sup>1</sup> In this case the court say: "I know not how, in a collateral proceeding, she can afterwards avoid that decree. But not only did she passively allow the process to culminate in a decree, but she actively engaged in its promotion, and, by her attorneys, agreed that the order of the court should be finally confirmed. Here, then, is a record which the defendant deliberately helped to make. How, then, can she escape from its consequences? (citing.)"<sup>2</sup> All these are cases of estoppel *in pais*, and hence are less strong than the case in hand, where the estoppel arises from a record, a record deliberately assented to by the defendant herself."

§ 262. Where proceedings in partition are properly taken to bind unknown owners, the judgment not only concludes them in respect to any interest they may have as tenants, but precludes them from showing afterwards that they had a paramount title in severalty to any part of the premises.<sup>3</sup> A decree in partition cannot be inquired into in a collateral suit to see whether irregularities exist in the proceedings.<sup>4</sup>

*The decree is final* and conclusive as to the nature and extent of the rights of the respective parties to it, until modified or set aside in some direct proceeding, even though it does not follow the allegations of the bill; and the fact that no partition was in fact made after the decree will not prevent a party from showing title under it.<sup>5</sup> The confirmation of the report of the commissioners in partition, and the final decree entered thereupon,

<sup>1</sup> Young v. Babilon, 91 Pa. St. 280; Vensel's Appeal, 77 Pa. St. 71; Cox v. Rogers, 77 Pa. St. 160.

<sup>2</sup> Chapman v. Chapman, 59 Pa. St. 214; Nass v. Van Swearingen, 10 S. & R. 146; Epley v. Witherow, 7 Watts, 163; Carr v. Wallace, 7 Watts. 394.

<sup>3</sup> Kane v. Rock River Co., 15 Wis. 179; Marvin v. Titwouth, 10 Wis. 30; Doe v. Prettyman, 1 Houst. 335; Doolittle v. Donmaus, 34 Ill. 457; Mead v. Mitchell, 17 N. Y. 210; White v. Philbrick, 5 Me. 147; Kane v. Parker, 4 Wis. 123; Brevoort v. Brevoort, 70 N. Y. 136. Cook v. Allen. 2 Mass. 461;

Nash v. Church, 15 Wis. 179; Pfeltz v. Pfeltz, 1 Md. Ch. 445; Rogers v. Tucker, 7 Ohio S. 417; Reese v. Holmes, 5 Rich. Eq. 540; Dunham v. Wilfong, 69 Mo. 355.

<sup>4</sup> Waltz v. Borroway, 25 Ind. 380; Stokes v. Middleton, 28 N. J. L. 32; Talman v. McCarty, 11 Wis. 401; Barnes v. Cunningham, 9 Rich. Eq. 475; Lineban v. Hatheway, 54 Cal. 251; Carey v. Rae, 58 Cal. 159; Hanna v. Scott, 84 Ind. 71; James v. Brown, 48 Iowa, 568.

<sup>5</sup> Allie v. Schmitz, 17 Wis. 169.

vests the title to the several parcels of the premises partitioned in the persons to whom they are assigned by the commissioners, and such decree can not be opened by the court at a subsequent term upon a mere motion.<sup>1</sup> The judgment, when executed, is conclusive evidence that the part set off to one petitioner was a part of the premises held by the parties in common; nor would it be open to a former co-tenant to set up an easement in the part thus set off, upon the ground that he had enjoyed it adversely before such partition was made.<sup>2</sup> The difference between a judgment and writ of partition at common law, and a partition by decree in chancery as it affects the title, is, that the former operates by way of delivery of possession *and estoppel*, while in the latter the transfer of title can be effected only by the execution of conveyances between the parties, which may be decreed by the court and compelled by attachment.<sup>3</sup> It is held, if the decree in partition recites that due notice was given, it is only *prima facie*, not conclusive evidence of the fact.<sup>4</sup>

§ 263. A decision of a United States district court enjoining a treasury warrant is final, and bars an action on the account which formed the subject matter of the warrant and bill of complaint.<sup>5</sup> All entries and orders made in the regular progress of a cause, during term time, must be received as emanating from the court, and all parties to them are estopped from disputing their correctness.<sup>6</sup> Thus, an order on a sheriff to deposit money in a bank,<sup>7</sup> and an order setting aside a sale made on execution, issued out of the court setting it aside.<sup>8</sup> So a party drawing up an order and sanctioning the entry of it as of the time when the decision was made, and served it on the adverse party, is barred from averring that it was not entered at the time it purported to be.<sup>9</sup> So a party cannot deny that a judgment was rendered on the day of its entry; if the record is regular on its face, it is

<sup>1</sup> Kane v. Parker, 4 Wis. 123; Gallagher v. Gallagher, 6 Watts, 473.

<sup>2</sup> Clapp v. Bromagham, 9 Cow. 530; Thomas v. Garvan, 4 Dev. 223, Marshall v. Crehore, 13 Met. 463; Fisher v. Dewerson, 3 Met. 544.

<sup>3</sup> Gay v. Partart, 106 U. S. 679.  
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<sup>4</sup> Milican v. Milican, 24 Tex. 426;

Secrist v. Green, 3 Wall. 744.

<sup>5</sup> U. S. v. Nourse, 9 Pet. 8.

<sup>6</sup> Deslonde v. Darrington, 29 Ala. 92.

<sup>7</sup> McLendon v. McGlann, 60 Ga. 244

<sup>8</sup> Scranton v. Ballard, 64 Ala. 402.

<sup>9</sup> White v. Belden, 4 Paige, 140.  
Coal Co. v. Dyett, 4 Paige, 273.

conclusive, as it imports absolute verity.<sup>1</sup> In order to make a judgment effectual as an estoppel, it must appear that the facts were actually passed upon by the jury in the former case, and, if the pleadings did not show it, and no evidence is introduced, the record is only evidence of what is necessarily put in issue by the pleadings.<sup>2</sup>

§ 264. It is not necessary in a partition suit, in order that a judgment shall bind the parties on a question of intestacy of an ancestor, or the validity of his will, that the adjudication of those matters should be in precise terms. It is sufficient if the substance is decided. The estoppel extends beyond what appears on the face of the judgment to every allegation, which, having been made on one side and denied on the other, was at issue, and determined in the course of the proceedings. Those who rely upon the estoppel must, of course, show that the matter in controversy has already been heard and determined; but where it is made to appear with sufficient clearness that the transaction has undergone a judicial investigation, the presumption will be irresistible that the judgment covered the whole, so far as it was entire and indivisible, and cannot be overcome, except by the clearest proof that no evidence was given as to that fact by the plaintiff, or that the defendant failed to take advantage of a defense that might have been made available.<sup>3</sup>

§ 265. Judgments are not merely final as to the facts actually litigated or decided, but they are usually (except where proceedings are instituted in the same cause of action for their reversal) conclusive evidence of their own rectitude and virtue; and it is upon this principle that no action will lie for obtaining a decree of judgment by false evidence.<sup>4</sup> The case of *Marriott v. Hamp-*

<sup>1</sup> *Ridgway v. Morrison*, 28 Ind. 201; *Ray v. McMurtly*, 20 Ind. 307; *Ellis v. Mills*, 28 Tex. 584; *Gates v. Preston*, 41 N. Y. 113.

<sup>2</sup> *Sherman v. Dilley*, 3 Nev. 21.

<sup>3</sup> *Clemens v. Clemens*, 37 N. Y. 59; *Shaw v. Barnhardt*, 17 Ind. 183.

<sup>4</sup> *Hillsborough v. Nichols*, 46 N. H. 379; *Dunlap v. Glidden*, 31 Me. 435; *Dampont v. Simpson*, Cro. Eliz. 520; *Eyres v. Sedgwick*, Cro. Jac. 601;

*Lyford v. Demerit*, 32 N. H. 234; *McRae v. Mattoon*, 13 Pickt. 53; *Greene v. Greene*, 2 Gray, 361; *Fuller v. Shattuck*, 13 Gray, 70; *Loring v. Steinman*, 1 Met. 204; *Bateman v. Willoe*, 1 Sch. & L. 204; *Sparhawk v. Wills*, 5 Gray, 423; *Bigelow v. Winsor*, 1 Gray, 301; *Phillips v. Hunter*, 2 H. Bl. 415; *Christmas v. Russell*, 7 Wall. 290; *Michaels v. Post*, 21 Wall. 398; *Stevens v. Tuite*, 104

ton (*ante*, p. 125), heretofore referred to, is a forcible illustration of this principle. The general principle that a judgment of a court possessing competent jurisdiction is final, admits of no doubt; but the principle extends still further, as to include everything that might be litigated or decided. The reason for the rule seems to be, that it is both expedient and proper to silence the contention of parties by accomplishing the ends of justice by a single and speedy decision of all their rights. It is, therefore, obvious that there should be some time prescribed to controversies of this sort, and can there be a more fitting and proper opportunity than one which affords a full and fair opportunity to examine and decide all their claims? This rule certainly imposes no hardship. It does not require anything more than a reasonable degree of vigilance and attention; a different course would be dangerous and oppressive. It would create infinite litigation and vexation, render judgments and final determinations of the rights of parties a useless expense, resulting in no benefit, but, on the contrary, resulting in a series of harassing operations, which, under the guise of justice, would never render justice. "Every one is bound to take care of his own rights, and to vindicate them in due season and in proper order." This is a sound and salutary principle of law. Accordingly, if a

Mass. 328; *Acorn The*, 2 Abb. U. S. R. 445; *Peck v. Woodridge*, 3 Conn. 36; *Smith v. Lewis*, 3 Johns. 157; *Homer v. Fish*, 1 Pick. 435; *Poolman v. Mitchell*, 48 Mo. 45.

*Foster v. Evans*, 51 Mo. 39; *Thompson v. McKay*, 41 Cal. 221; *Woodin v. Clemence*, 32 Iowa, 280; *Jordan v. Van Epps*, 85 N. Y. 427; *Birkhead v. Brown*, 3 Sand. 145; *Le Guen v. Gouverneur*, 1 Johns. Cas. 502; *Huffer v. Allen*, L. R. 2 Exch. 14; *Miller v. Manice*, 6 Hill, 122; *Bailey v. Bussing*, 37 Conn. 39; *Fowle v. N. H. & Co.*, 107 Mass. 352; *Crosby v. Jerolman*, 37 Ind. 264; *Masteck v. Thorp*, 22 Cal. 444; *Ewing v. McNairy*, 20 Ohio S. 315; *Pickens v. Yarborough*, 30 Ala. 408; *Yantes v. Burdett*, 3 Mo. 457; *Vilas v. Jones*, 1 N. Y. 274; *Burton v. Wiley*, 26 Vt.

430; *Stanard v. Rogers*, 4 H. & M. 438; *Hill v. Bowyer*, 18 Gratt. 364; *Albro v. Dayton*, 28 Ill. 325; *Wilder v. Lee*, 64 N. C. 50; *Hendrickson v. Hinckley*, 17 How. 444; *Curtis v. Cisna*, 1 Ohio, 432; *Thompson v. Myrick*, 24 Minn. 4; *Burton v. Hynsen*, 14 Ark. 32; *Arrington v. Washington*, 14 Ark. 218; *Carey v. Gregory*, 13 B. Mon. 505; *Roebuck v. Halkins*, 38 Ga. 174; *Lansing v. Eddy*, 1 Johns. Ch. 49; *Slack v. Wood*, 9 Gratt. 40; *Parker v. Jones*, 5 Jones Eq. 276; *Tapp v. Rankin*, 9 Leigh. 478; *Wright v. King*, Harr. Eq. 12; *Powell v. Boring*, 44 Ga. 169; *Hiley v. Hartridge*, 44 Ga. 623; *Smith v. Powell*, 50 Ill. 21; *Lucas v. Spencer*, 27 Ill. 15; *Houston v. Wolcott*, 7 Iowa 173; *Rabmun v. Shortridge*, 2 Blackf. 480.

defendant, having the means of defense in his power, neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded.<sup>1</sup> Thus where parties having submitted to arbitration their partnership difficulties, each depositing his note with the arbitrators, under an arrangement that the arbitrators were to indorse down the note of the one they found to be debtor to the amount of their award against him and deliver the same to the other party, and this having been done and suit brought on such note, and the debtor having thereupon filed a bill to have the award corrected by giving him credit for an item which by accident or mistake was not brought to the attention of the arbitrators, and obtained a decree, the suit on the note being stayed in the mean time, upon the suit on the note being again moved, the debtor could not set up the defense that the award was not valid; a party who has got relief on one basis will not be permitted to litigate the matter over again on another basis, on the suggestion that he has a defense which he did not see fit to rely on before.<sup>2</sup> The only case forming an exception to this rule is the case of mutual dealings between the parties, where the defendant omits to set off his counter demand,<sup>3</sup> or withdraws it before judgment,<sup>4</sup> and may, unless prevented by statute, still recover in a cross action.

§ 266. Matters of set-off or counter-claim which a party may

<sup>1</sup> *Rogers v. Higgins*, 57 Ill. 244; *Wilbur v. Gilmore*, 21 Pick. 250; *Foltze v. Proutze*, 15 Ill. 434; *Lore v. Truman*, 10 Ohio S. 45; *Stafford v. Clark*, 1 C. & P. 403; *Piice v. Dewey*, 6 Sawyer, 493; *Morgan v. Plumb*, 9 Wend. 487; *People v. Smith*, 51 Barb. 360; *Keene v. Clark*, 5 Rob. (N. Y.) 38; *Hughes v. U. S.*, 4 Wall. 232; *Birch v. Funk*, 2 Met. (Ky.) 544; *Johnson v. White*, 21 Miss. 584; *Agnew v. McElroy*, 18 Miss. 522; *Luttrell v. Fisher*, 11 Heisk. 101; *Gold v. Fite*, 58 Tenn. 237; *Turner v. Dibrell*, 59 Tenn. 235; *Keenan v. Miller*, 2 Ga. 325; *Van Vliet v. Olin*, 1 Nev. 495; *Brackett v. Hoirt*, 20 N. Y. 257; *Pierson v. Reynolds*, 49 Mich. 224; *Mally v. Mally*, 52 Iowa,

454; *Davis v. Hedges*, L. R. 6 Q. 687; *Hindley v. Haslum*, L. R. 3 Q. B. D. 481.

<sup>2</sup> *Beam v. McComber*, 35 Mich. 432.

<sup>3</sup> *Hobbs v. Duff*, 23 Cal. 596; *Robbins v. Harrison*, 31 Ala. 160; *Le Guen v. Gouvernor*, 1 Johns. Cas. 501; *Robinson v. Wiley*, Hemp. 78; *Emerson v. Hereford*, 8 Bush, 229; *Fennon v. Thompson*, 38 Ga. 533; *McEwen v. Bigelow*, 40 Mich. 215.

<sup>4</sup> *Bunnell v. Wright*, 51 Barb. 257; *Thompson v. Wood*, 1 Hilt. 97; *Doty v. Brown*, 4 N. Y. 71; *Davis v. Talcott*, 14 Barb. 611; *R. R. Co. v. Elmore*, 53 N. Y. 624; *Kerr v. Hays*, 35 N. Y. 531; *Gillespie v. Torrence*, 25 N. Y. 306.

set up or not, are not regarded as included in the definition of a defense to an action; if the matter of set-off or counter claim is passed upon it is barred by the judgment, if not, the defendant may make it the subject of a separate or distinct action; the question is, was it adjudicated? The only penalty for not setting it up in the prior cause being in the matter of costs. If a plaintiff joins in his complaint several separate causes of action, making the aggregate of such causes the amount for which he demands judgment, and, neglecting to withdraw any of these causes on the trial, he fails to establish any of them by proof, he cannot afterwards bring another suit for those items.<sup>1</sup> The same principle is applicable in ejectment, where the defendant purchases title after judgment is rendered against him. The general rule is intended to prevent litigation and to maintain peace; were it otherwise, men would never know when they might repose with security on the decisions of courts of justice, and judgments solemnly and deliberately rendered would cease to be revered as being no longer the end of controversy and the evidence of right,<sup>2</sup> whose adjudication were necessary to the final disposition of the case. A judgment for the defendant in trespass, for taking a chattel, is an estoppel in an action for the money received from its subsequent sale, for the reason that both actions relate to the same subject-matter, and must be determined substantially upon the same evidence.<sup>3</sup> So, where in an action against a railway company for damages in consequence of its failure to provide a crossing, resulting in a judgment for the defendant, another action cannot be maintained to compel it to provide a crossing.<sup>4</sup> And where a plaintiff, in an action of ejectment on a mortgage, had previously recovered judgment on a note given by the defendant for the debt, for which the mortgage was security, the defendant in the ejectment suit was not allowed to plead the same defense which he had unsuccessfully used in the action on the note.<sup>5</sup> A failure in an action brought

<sup>1</sup> *Savery v. Sypher*, 39 Iowa, 675;  
*Fairfield v. McNanny*, 37 Iowa, 75.

<sup>2</sup> *Benton v. Burgot*, 3 B. & C. 235;  
*Griffin v. Wallace*, 66 Ind. 410.

<sup>3</sup> *Le Guen v. Gouverneur*, 1 Johns.  
 436; *Huffer v. Allen*, L. R. 2 Exchq. 15

<sup>4</sup> *Lewis v. Nenzell*, 33 Pa. St. 222

<sup>5</sup> *Bettys v. R. R. Co.*, 43 Iowa, 602;  
*Atwood v. Robbins*, 35 Vt. 530.

<sup>6</sup> *Betts v. Starr*, 5 Conn. 553; *God-  
 dard v. Bank*, 4 N. Y. 147; *Cist v.  
 Ziegler*, 16 S. & R. 282; *Sheldon v.*

to recover damages for the non-delivery of lumber, was conclusive against the plaintiffs, denying the non-delivery in action, on a bond given for the price.<sup>1</sup> The limited nature of a judgment for damages only does not prevent its operation as an estoppel as to all the questions embraced in the pleadings; and as the non-delivery of the lumber must have been the material point in issue, in order to found a verdict for the assessment of damages, it is obvious that the judgment must be conclusive in action for the price of the lumber. So, where there is an entire contract for the delivery of goods, a delivery of part, and a refusal to receive the residue, and a suit for the price of those delivered, such judgment is a bar to another action for not accepting the goods.<sup>2</sup> Where, in an action to enjoin a seizure of property as illegal, and to recover damages, if the judgment maintaining the injunction is silent as to damages, it is equivalent to a rejection of the claim for damages, and will sustain the plea of *res judicata* in a subsequent suit for damages.<sup>3</sup> The presumption is, that the judgment covers the whole matter. So, where a joint judgment is recovered against several parties in a suit against one for contribution, he cannot plead that he was not liable.<sup>4</sup>

§ 267. A judgment *in personam* recovered without notice, or attachment of property on *mesne* process is void. In a collateral proceeding, a judgment against one who had no opportunity to defend, may be avoided by proof of fraud, or shown to be void upon its face; a judgment of non-suit is not a bar to another action. Nor an agreement to submit a case upon an agreed statement of facts upon which judgment and nonsuit was entered by the court.<sup>5</sup> But where the facts put in issue by an

Carpenter, 4 N. Y. 578; Etheridge v. Osburn, 12 Wend. 399; Atwood v. Robbins, 35 Vt. 530; Poorman v. Mitchell, 48 Mo. 485; Geiser Co. v. Farmer, 27 Minn. 428.

<sup>1</sup> White v. Reynolds, 3 Pa. St. 97; Casler v. Shipman, 35 N. Y. 533; Tuska v. O'Brien, 68 N. Y. 446; Rice v. Garrett, 12 La. Ann. 755; Spencer v. Bannister, 12 La. Ann. 756.

<sup>2</sup> Carvill v. Garrigus, 5 Pa. St. 152;

Tams v. Richards, 26 Pa. St. 97.

<sup>3</sup> Spencer v. Bannister, 12 La. Ann. 766; Rice v. Garrett, 12 La. Ann. 755.

<sup>4</sup> Bailey v. Bussing, 37 Conn. 349.

<sup>5</sup> Homer v. Brown, 16 How. 351; Jay v. Almy, 1 Wood. & M. 262; Derby v. Jacques, 1 Cliff. 425, Morgan v. Bliss, 2 Mass. 111; Knox v. Waldborough, 5 Me. 185; Budge v. Sumner, 1 Pick. 371; Wade v. Howard, 8 Pick. 353.

assignment of a breach of a sheriff's bond have been once tried in a statutory proceeding, they cannot again be drawn into question, and it is a question of law, on inspection of the record, whether they were or were not in issue in the former proceedings. So, a decree, that a vested interest in remainder is not subject to the claims of creditors, though erroneous, is *res adjudicata*; and is conclusive against the rights of creditors, when the estate comes into possession of the remainderman by the death of the tenant for life.<sup>1</sup> No recovery can be had on a cause of action which has been pleaded or offered in evidence as a defense in a former action, in which it was legally admissible, although the court may have erred in excluding it from the jury. The estoppel of an adjudication, made on grounds purely technical, and under such circumstances that the merits could not come in question, will be limited to the point actually decided. A judgment is conclusive on all points within the scope of the record and legally brought before the court and jury,<sup>2</sup> although extrinsic evidence may be given for the purpose of showing what the controversy really was, and showing that matters expressly or impliedly embraced in the pleadings, and which might have been adjudicated, were not presented or decided in fact.<sup>3</sup> But while parol evidence may sometimes be admitted for the purpose of limiting the estoppel, it is never allowed to enlarge its operation, or to show that matters foreign to the record were embraced in the verdict.<sup>4</sup>

§ 268. The reasons assigned by a court for its judgment are immaterial, if the record shows that such judgment was, in fact, correct.<sup>5</sup> Nor will the mistakes of a judge who tried the cause serve as a reason why matters *prima facie* within the bar of the judgment should be excluded from it, for the reason that the remedy is by a new trial or writ of error.<sup>6</sup> Thus, where a case

<sup>1</sup> Nichols v. Levy, 5 Wall. 433.

<sup>2</sup> McGuinty v. Herick, 5 Wend. 245; Jones v. Lunn, 8 Johns. 453; Atwood v. Robbins, 35 Vt. 530.

<sup>3</sup> Smith v. Weeks, 26 Barb. 463; Sweet v. Tuttle, 14 N. Y. 465; Smith v. Smith, 79 N. Y. 634; Kiern v. Ainsworth, 95 Pa. St. 310, Felton v.

Smith, 88 Ind. 149; Gates v. Bennett, 33 Ark. 475.

<sup>4</sup> Campbell v. Butts, 3 N. Y. 173; Athearn v. Brannon, 8 Blackf. 440; Burdick v. Post, 12 Barb. 168.

<sup>5</sup> Palmer v. Yarrington, 1 Ohio S. 253.

<sup>6</sup> Colburn v. Woodworth, 31 Barb.

has been once submitted to a jury upon an issue involving the merits of the plaintiff's claim, and a judgment has been rendered on their verdict, until such judgment has been set aside, the plaintiff will not be allowed, either in law or equity, to bring another suit on the same cause of action, on the ground that the verdict in the first suit was caused by an erroneous instruction of the judge to the jury.<sup>1</sup> So, after judgment, a clerical error in the transcript of the record, by which the judgment is reduced below the true amount, is not a ground for a new suit for the difference.<sup>2</sup> So, where a court erroneously sustains a demurrer to a defense, and renders a judgment in favor of the plaintiff, when upon the pleadings judgment should have been rendered for the defendant, such defendant cannot maintain an independent action upon the defense so disregarded by the court; his remedy for the erroneous decision must be sought in the suit in which it was made.<sup>3</sup>

§ 269. But in order to give a judgment this conclusive effect, it must have been made by a court of competent jurisdiction, upon the same subject-matter, between the same parties, and for the same purpose, and such a judgment between the same parties, upon the same point, is conclusive as a plea in bar, or when given in evidence; and it makes no difference whether other parties are estopped by it or not, and it is so far conclusive, although all the parties in interest may not have been before the court, that its validity cannot be collaterally questioned in another tribunal, and when it is used as evidence its regularity cannot be inquired into,<sup>4</sup> in that or any other court. It cannot be impeached because

381; *Ballinger v. Craig*, 31 Barb. 554; *Mondel v. Steele*, 8 M. & W. 858; *Brown v. Isbell*, 11 Ala. 1009; *Rogers v. Evans*, 8 Ga. 143; *Chestnut v. Marsh*, 13 Ill. 173; *Preston v. Clark*, 9 Ga. 244; *Wickersham v. Whedon*, 33 Mo. 561; *Keokuk Co. v. Alexander*, 21 Iowa, 377; *Winslow v. Stokes*, 3 Jones L. 235; *Smith v. Whiting*, 11 Mass. 445.

<sup>1</sup> *Thornton v. Campbell*, 6 Fla. 546.

<sup>2</sup> *State v. Hodges*, 25 Tex. 63.

<sup>3</sup> *Collins v. Bennett*, 46 N. Y. 490.

<sup>4</sup> *Snevely v. Wagner*, 8 Pa. St. 396; *Wright v. Marsh*, 2 G. Greene, 110; *Cole v. Hall*, 2 Hill, 627; *Meiklein v. Trapnell*, 34 Pa. St. 47; *Herr v. Herr*, 5 Pa. St. 430; *Painter v. Henderson*, 7 Pa. St. 51; *Lockhart v. John*, 7 Pa. St. 139; *Lair v. Hunsicker*, 28 Pa. St. 123; *Ins. Co. v. Bank*, 57 Pa. St. 392; *Fowler v. Gordon*, 24 La. Ann. 270; *Foster v. Dugan*, 8 Ohio, 106; *Wilson v. Bull*, 10 Ohio, 256; *Castle v. Mathews*, Hill & D. 438; *Croghan v.*

of a wrong judgment, based upon an erroneous application of legal principles, or insufficient evidence, or that the evidence was

- Livingston, 17 N. Y. 220; Austin v. Seminary, 8 Met. 202; Foster v. Abbot, 8 Met. 598; Richards v. Rote, 68 Pa. St. 253; Wilson v. Smith, 23 Gratt. 493; Waltz v. Borroway, 25 Ind. 380; Johnson v. Kirkhoff, 35 Mo. 291, Latrielle v. Dorleque, 35 Mo. 233; Bohart v. Atkinson, 14 Ohio, 428; Herbert v. Smith, 6 Lans. 493; Goudy v. Hall, 80 Ill. 109; Williamson's Case, 26 Pa. St. 9; Robinson, in re, 6 McLean, 355; Goss v. McClaren, 17 Tex. 107; Dorsey v. Thompson, 37 Md. 25; Wyche v. Clapp, 43 Tex. 43; Malone's Appeal, 79 Pa. St. 481; Mattingly v. Nye, 8 Wall. 370; Williams v. Sidmouth, L. R. 2 Ex. 284; Campbell v. Strong, 1 Hemp. 265; Hollister v. Abbott, 31 N. H. 442; Wall v. Wall, 28 Miss. 409; Kelly v. Mize, 3 Sneed, 59; Smith v. Abbott, 40 Me. 442; Hooks v. Moses, 8 Ired. 88; Kerr v. Leighton, 2 Greene, (Ia.) 196; Estep v. Watkins, 1 Bland, 486; Hayes v. Ford, 55 Ind. 52; Diehl v. Paige, 2 Green Ch. 143; Maxwell v. Pittenjer, 2 Green, 156; Jones v. Read, Humph. 335; Day v. Kerr, 7 Miss. 426; Supervisors v. U. S., 4 Wall. 435; Annett v. Terry, 35 N. Y. 256; Blystone v. Blystone, 51 Pa. St. 373; Cadmus v. Jackson, 52 Pa. St. 295; Brown v. Christie, 27 Tex. 73; Lawler v. White, 27 Tex. 250; Watson v. Hopkins, 27 Tex. 637; Shaw, in re, 7 Ohio S. 81; Hampson v. Weare, 4 Ia. 13; Bridges v. Nicholson, 20 Ga. 90; Harrison v. Pender, Busb. L. (N. C.) 78; Harrison v. Simmons, Busb. L. (N. C.) 80; Woodward v. Hill, 6 Wis. 143; Nash v. Church, 10 Wis. 303; Doty v. Brown, 4 N. Y. 71; Warner v. Mullane, 23 Wis. 450; McLoud v. Silby, 10 Conn. 390; Minor v. Walter, 17 Mass. 237; Lewis v. Simonton, 8 Humph. 185; Cochran v. Loring, 17 Ohio, 409; Gordon v. Baltimore, 5 Gill, 231; Wallus v. Munroe, 17 Md. 501; Appleton v. Bowles, 9 B. R. 354; Cooper v. Reynolds, 10 Wall. 308; Lee v. Kingsbury, 13 Tex. 68; Jackson v. De Laney, 13 Johns. 537; Loring v. Mansfield, 17 Miss. 394; Girdley v. Harraden, 14 Mass. 496; Batchelder v. Robinson, 6 N. H. 12; Kent v. Kent, 2 Mass. 328; McNiel v. Bright, 4 Mass. 282; Briggs v. Richmond, 10 Pick. 391; State v. St. Gemme, 31 Mo. 230; Loring v. Bridge, 9 Mass. 124; Eastman v. Curtis, 4 Vt. 616; Suckett v. Gwathmey, Litt. Sel. Cas. 121; De Forest v. Strong, 8 Conn. 513; Wallace v. Usher, 4 Bibb, 508; Taylor v. McKnight, 1 Mo. 282; Robinson v. Jones, 8 Mass. 336; McNeil v. Bright, 4 Mass. 282; Haygood v. McKoon, 49 Mo. 79; Woods v. Lee, 21 La. Ann. 505; Ward v. Hudspeth, 44 Ala. 315; McCauley v. Harvey, 40 Cal. 497; Buckley v. Andrews, 39 Conn. 524; Fowler v. Gordon, 24 La. Ann. 270; Leaverton v. Leaverton, 40 Tex. 218; Rowe v. Parson, 13 N. Y. Supreme Ct. 338; Pollock v. Buie, 43 Miss. 140; Moorhead v. Commonwealth, 1 Grant's Cas. 214; Wood v. Wilson, 4 Houst. 94; Richardson v. Hazleton, 101 Mass. 108; Harvey v. Tyler, 2 Wall. 328; Lyon v. Odom, 31 Ala. 234; Succession of Garrison, 15 La. 27; Legee v. Thomas, 3 Blatch. C. C. 11; Johnson v. Alden, 15 La. Ann. 505; George v. Norris, 23 Ark. 121; Stovall v. Banks, 10 Wall. 583; Satterlee v. Bliss, 36 Cal. 459; Iverson v. Loberg, 26 Ill. 179; Vanderpoel v. Van Valkenburgh, 6 N. Y. 190; Saltonstall v. Riley, 28 Ala. 164; Milford v. Holbrook, 9 Allen, 17; Farr v. Ladd, 37 Vt. 153; Haynes v. Meeks, 10 Cal. 110; Cailletan v. Ingouf.

false,<sup>1</sup> or for the reason that the writ and service were defective, being a jurisdictional question. The question of the sufficiency of service, or whether property attached was subjected to seizure is one of jurisdiction. A judicial determination of jurisdiction is binding upon the parties until set aside or reversed in a direct proceeding.<sup>2</sup> The judgment of a court of superior jurisdiction may be collaterally attacked upon the ground that the court ren-

14 La. Ann. 623; *Sturdy v. Jacobway*, 19 Ark. 499; *Dixey v. Laning*, 49 Pa. St. 14; *Wimberly v. Hurst*, 33 Ill. 166; *Peterman v. Watkins*, 19 Ga. 153; *Bartlett v. Russell*, 41 Ga. 196; *Frost v. McLeod*, 19 La. Ann. 69; *Simple v. Wright*, 32 Cal. 659; *Lamprey v. Nudd*, 29 N. H. 299; *Finneran v. Leonard*, 7 Allen, 54; *Hendrickson v. Norcross*, 19 N. J. Eq. 417; *State v. Tucker*, 22 Ia. 234; *Clark v. Bryan*, 16 Md. 171; *Woodman v. Smith*, 37 Me. 21; *Billings v. Russell*, 23 Pa. St. 189; *Cyphert v. McClure*, 22 Pa. St. 195; *Reed v. Wright*, 3 Greene, (Ia.) 15; *Chamberlain v. Carlisle*, 26 N. H. 560; *Lynch v. Swanton*, 53 Me. 100; *Love v. Waltz*, 7 Cal. 250; *Moore v. Felker*, 7 Fla. 44; *Hopkinson v. Shelton*, 1 Ala. 303; *Perry v. Lewis*, 49 Miss. 443; *Whitehurst v. Rogers*, 38 Md. 303; *Briggs v. Bowen*, 60 N. Y. 454; *Hallock v. Deming*, 69 N. Y. 238; *Callahan v. Griswold*, 9 Mo. 784; *Sturgess v. Rogers*, 26 Ind. 1; *Lucas v. San Francisco*, 28 Cal. 591; *Roundtree v. Turner*, 36 Ala. 555; *Tracy v. Merrill*, 103 Mass. 280; *Degelos v. Woolfold*, 21 La. Ann. 706; *Durnford, Succession of*, 1 La. Ann. 92; *Lefevre v. Montilly*, 1 La. Ann. 42; *McDonald v. Gregory*, 41 Iowa, 13; *Stoddard v. Burton*, 41 Iowa, 582; *Smith v. Way*, 9 Allen, 472; *Hanscomb v. Hewes*, 12 Gray, 332; *Huntington v. Smith*, 25 Ind. 486; *Buell v. Trustees*, 11 Barb. 602; *State v. Beloit*, 20 Wis. 79; *Dunham v. Wilfong*, 69 Mo. 355; *Williams v. Sidmouth, &c. Co.*, L. R. 2

Exchq. 281; *Gorman, in re*, 124 Mass. 190.

<sup>1</sup> *Fisk v. Miller*, 20 Tex. 579; *Dilling v. Murray*, 6 Ind. 324; *Cooley v. Smith*, 17 Iowa, 29; *Stevenson v. Bonesteel*, 30 Iowa, 286; *Stewart v. Nunemaker*, 2 Ind. 47; *Martin v. Porter*, 4 Heisk. 407.

<sup>2</sup> *Marton v. Barron*, 37 Mo. 556; *Dutton v. Hobson*, 7 Ks. 196; *Armstrong v. Grant*, 7 Ks. 285; *Bank v. Eldridge*, 23 Conn. 556; *Draper v. Bryson*, 17 Mo. 71; *Seely v. Reid*, 3 Iowa, 374; *Campbell v. Hays*, 41 Miss. 561; *Crizer v. Golen*, 41 Miss. 563; *Bonsall v. Issett*, 14 Iowa, 309; *Whitwell v. Barbier*, 7 Cal. 54; *Norton v. Harding*, 3 Or. 261; *Hotchkiss v. Cutting*, 14 Minn. 537; *Bates v. Spooner*, 45 Ind. 489; *Dequindre v. Williams*, 31 Ind. 444; *Bragg v. Lorio*, 1 Woods, 209; *Reilly v. Lancaster*, 39 Cal. 354; *Brown v. Nichols*, 42 N. Y. 26; *Kirby v. Fitzgerald*, 31 N. Y. 417; *R. R. Co. v. Sparhawk*, 1 Allen, 448; *Bumstead v. Bumstead*, 31 Barb. 661; *Wall v. Clark*, 19 Tex. 321; *Smith v. State*, 5 Tex. 578; *Cody v. Hough*, 20 Ill. 42; *Landes v. Brant*, 10 How. 348; *State v. Culler*, 18 Md. 418; *Kipp v. Fullerton*, 4 Minn. 473; *Branson v. Caruthers*, 49 Cal. 375; *Cole v. Butler*, 43 Me. 401; *Doyle v. Smith*, 1 Cold. 15; *Duer v. Thweatt*, 39 Ga. 578; *Lawler's Heirs v. White*, 27 Tex. 250; *Watson v. Hopkins*, 27 Tex. 637; *Bennett v. Child*, 19 Wis. 362; *Callen v. Ellison*, 13 Ohio, 446; *Peters v. Leange*, 13

dering such judgment had not jurisdiction of the action. But such facts or circumstances only can be shown or relied on, in support of such attack, as affirmatively appear on the face of the record, or what, under the law as it read at the date of the judgment, constituted the judgment-roll. Where a judgment recites the fact that the defendant has been duly served with process, this is a direct adjudication by the court upon the point, and is as conclusive on the parties as any other fact decided in the cause, provided it does not affirmatively appear from other portions of the record constituting the judgment-roll, that the recital is untrue. The presumption is in favor of the jurisdiction and of the regularity of the proceedings of courts of superior or general, jurisdiction, whether their proceedings be according to the course of the common law or governed by statute law, and whether they are founded on jurisdiction of the person of the defendants acquired by making actual or constructive service of the summons on him. But no such presumptions arise in favor of the jurisdiction or regularity of the proceedings of courts of inferior or limited jurisdiction. The record of a court of superior jurisdiction imports absolute verity; it cannot be collaterally attacked by proof *aliunde*.<sup>1</sup> If the court has jurisdiction of the subject-matter and the parties, it is altogether immaterial how grossly irregular or

Md. 58; *Stephenson v. Newcomb*, 5 Harling. 150; *Farrington v. King*, 1 Bradf. 182; *Bostic v. Love*, 16 Cal. 69; *Otis v. The Rio Grande*, 1 Woods, 279; *Netherland v. Johnson*, 5 Lea, 340; *Dunham v. Wilfong*, 69 Mo. 355; *State v. Holmes*, 69 Ind. 577; *Prescott v. Fisher*, 23 Ill. 390; *Hunter v. Stoneburner*, 92 Ill. 75.

<sup>1</sup> *Sears v. Terry*, 26 Conn. 273; *Ranoul v. Griffe*, 3 Md. 54; *Evans v. Ashby*, 22 Ind. 15; *Bay v. Cook*, 31 Ill. 336; *Wright v. Marsh*, 2 Greene, (Ia.) 94; *Barney v. Clittenden*, 2 Greene (Ia.) 165; *Pease v. Whitten*, 31 Maine, 117; *Warden v. Eichbaum*, 3 Grant Cas. 42; *Bank v. Munford*, 3 Grant Cas. 232; *Wiley v. Kelsey*, 9 Ga. 117; *West v. Nixon*, 3 Grant Cas. 236; *Hahn v. Kelly*, 34 Cal. 391; *Mul-*

*ford v. Estudillo*, 24 Cal. 94; *McCaulley v. Fulton*, 44 Cal. 355; *Thaxton v. Williamson*, 72 N. C. 125; *Lewis v. Armstrong*, 45 Ga. 131; *Delong v. Fort*, 45 Ga. 122; *Mangham v. Reed*, 11 Ga. 137; *Cochran v. Davis*, 20 Ga. 581; *White v. Landaff*, 35 N. H. 128; *Moore v. Robison*, 6 Ohio, 302; *Greenlaw v. Kernahan*, 4 Sneed, 371; *Clifford v. Plumer*, 45 N. H. 269; *Norton v. Harding*, 3 Or. 361; *Witt v. Russey*, 10 Humph. 208; *Martin v. McLean*, 49 Mo. 361; *Cadmus v. Jackson*, 52 Pa. St. 295; *Carrick v. Armstrong*, 2 Cold. 265; *Schley v. Dixon*, 24 Ga. 273; *McFeeley v. Osborn*, 19 La. An. 471; *Friedlander v. Loucks*, 34 Cal. 18; *Alexander v. Nelson*, 42 Ala. 463; *Willard v. Whitney*, 49 Me. 235; *McDaniel v. Fox*, 77 Ill. 343; *Swearin*

manifestly erroneous its proceedings may have been; its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached.<sup>1</sup> And this even where the judgment would without question be reversed on appeal.<sup>2</sup> Where the record of a decree of a court of competent jurisdiction is offered in evidence, every presumption is to be indulged as to the correctness of the facts on which it was founded, and which appear of record.<sup>3</sup> Thus, in a case of a sale of mortgaged premises under a decree in equity, the regularity of the sale cannot be called into question in a collateral suit; and so conclusive is their effect that even the courts rendering them are estopped from annulling their final decrees or judgments, either for error of fact or law, after the term at which they are rendered, unless it be for a clerical error, or to reinstate a cause dismissed by mistake; and a

gen v. Gulick, 67 Ill. 208; Mobley v. Mobley, 9 Ga. 247; Fuller v. Smith, 5 Jones Eq. 192.

<sup>1</sup> Sheldon v. Newton, 3 Ohio, 494; Tallman v. McCarty, 11 Wis. 401; Stanford v. Bradford, 45 Ga. 97; Barron v. Tart, 18 Ala. 668; Breeze v. Doyle, 19 Cal. 101; Gregg v. Forsyth, 24 How. 179; Turner v. Ireland, 11 Humph. 447; Bennett v. Couchman, 48 Barb. 73; Pendleton v. Weed, 17 N. Y. 72; Clark v. Bryan, 16 Md. 171; Lutes v. Alpaugh, 23 N. J. L. 165; Burton v. Warren, 11 Ia. 166; Cameron v. Boyle, 2 Greene (Ia.) 154; Delaney v. Reade, 4 Ia. 292; Lind v. Adams, 10 Ia. 398; Hoffertbert v. Klinkhardt, 58 Ill. 450; Bank v. Humphreys, 47 Ill. 227; McBane v. People, 50 Ill. 503; Mylar v. Hughes, 60 Mo. 105; Winston v. Affalter, 49 Mo. 263; Dickerman v. Powell, 21 Ga. 143; Alderson v. Bell, 9 Cal. 315; Cole v. Conolly, 16 Ala. 271; Fuller v. Smith, 5 Jones Eq. 192; Fisher v. Williams, 56 Vt. 586; Otterson v. Middleton, 102 Pa. St. 78; Woodhouse v. Freebdates, 77 Va. 317; Winbush v. Breeden, 77 Va. 324; Morris v. Gentry, 89 N. C. 248; Darby v.

Shannon, 19 S. C. 526; Martin v. Hall, 70 Ala. 421; Black v. Pattison, 61 Miss. 599; Denni v. Elliott, 60 Tex. 337; Frisby v. Withers, 61 Tex. 134; McCormack v. Kimmell, 4 Ill. App. 121; Shevely v. Welch, 20 F. R. 23; Linehan v. Hathaway, 54 Cal. 251; Long v. Bienenman, 59 Tex. 210.

<sup>2</sup> Jefferson County v. Reitz, 56 Pa. St. 44; Cassell v. Scott, 17 Ind. 514; Crutchfield v. State, 24 Ga. 335; Thovenin v. Rodrigues, 24 Tex. 468; Cair v. Miner, 42 Ill. 179; Jenness v. Beiry, 17 N. H. 549; Supervisors v. U. S., 4 Wallace, 435; Bond v. Pacheco, 30 Cal. 530; Ferguson v. Kunkler, 11 Minn. 104; Joyce v. McAvoy, 31 Cal. 273; Yapple v. Titus, 41 Pa. St. 195; Finneran v. Leonard, 7 Allen, 54; Linehan v. Hatheway, 54 Cal. 251.

<sup>3</sup> Hardy v. Gholson, 26 Miss. 70; Thompson v. McKinley, 47 Pa. St. 353; Wilson v. Wilson, 18 Ala. 176; State v. Byers, 34 Mo. 138; Hays v. Ford, 55 Ind. 52; Bottorf v. Wise, 53 Ind. 32; Alexander v. Knox, 6 Sawyer, 54; Goldsby v. Goldsby, 67 Ala. 560.

<sup>4</sup> Gartside v. Outley, 58 Ill. 210.

final decree in chancery is as conclusive as a judgment at law.<sup>1</sup> But a judgment for a defendant on the plea of the statute of limitations is not necessarily a bar to another action on the same contract in another State.<sup>2</sup>

§ 270. There are many reasons why the plea of *res adjudicata* should be more cautiously received under the Code system of pleadings, than is or was necessary under the common law system of pleading. The want of certainty in the system of pleading under the Code renders it not unfrequently difficult, if not impossible, to determine what issues have been joined, and the precise rights which have been adjudicated. The united law and equity jurisdiction enables parties litigant to embrace in the same suit more than one cause of action or defense, which would be incongruous and inadmissible under a different system, and perhaps the widest range known to any system tolerated in the form and scope of code pleadings. Parties who have several causes or rights of action against the same party, of different and distinct character, are not compelled to unite them in the same suit, on penalty of being barred as to those not included; nor, is this the meaning of that well-settled principle, that a judgment or decree of a court of competent jurisdiction is final and conclusive, not only as to every matter determined, but also as to every other matter which the parties might litigate in the cause, and which they might have had decided; nor does the rule apply so as to defeat a trial upon the merits because of a former suit between the same parties, upon the same subject-matter, where no adjudication upon the merits is sought or prayed for by either party, in which a judgment upon a general exception was rendered, merely dissolving an injunction which had been previously

<sup>1</sup> *Harpending v. Wylie*, 13 Bush, 158; *Lane v. Wheelers*, 46 Miss 666, *Cotten v. McGehee*, 54 Miss. 621; *Graham v. Parham*, 32 Ark. 676; *Robinson v. Brown*, 82 Ill. 279; *Norman v. Burns*, 67 Ala. 248; *Waring v. Lewis*, 53 Ala. 615; *King v. Smith*, 15 Ala. 270; *Watts v. Gayle*, 20 Ala. 826; *Allman v. Owen*, 31 Ala. 167; *Duckworth v.*

*Duckworth*, 35 Ala. 70; *Otis v. Dargan*, 53 Ala. 178; *Brooks v. Ankenney*, 7 Oreg. 461; *Powers v. Bank*, 129 Mass. 44; *McWilliams v. Monell*, 23 Hun, 162, *Price v. Dewey*, 6 Sawyer, 493, *Norwood v. Kirby*, 70 Ala. 397; *Caldwell v. White*, 77 Mo. 471.

<sup>2</sup> *Wright v. Bodley*, 14 Pet. 159; *Bank v. Donnally*, 8 Pet. 361; See also *Gudger v. Barnes*, 4 Heisk. 570.

awarded against a third party having no interest in the suit, and awarding costs, &c. The Code system of pleading does not by any means favor a multiplicity of suits, and when the proper parties are brought before them, the courts will hear and finally determine all the rights of the parties touching the subject-matter, if properly presented, whether such was the original intention of the parties or not; but, if neither party demands a judgment upon the merits of the respective rights claimed, and the judgment of the court appears to have been rendered upon the merits of a mere preliminary question, it would be rendering harsh injustice, and make justice and equity a species of tyranny utterly antagonistic to the signification of those terms.

§ 271. Cases to which the doctrine of *res adjudicata* is applicable fall properly into two classes: those in which a controverted fact is judicially established upon the evidence by a court of competent jurisdiction; those in which the facts alleged are not controverted, but admitted by demurrer. The former class may be used as estoppels in any other of a not higher nature between the parties as to any fact directly in issue and decided; the latter can merely be used as a bar to a second suit for the same cause. There are cases to be found in which it is questioned whether a former judgment can be a bar to a subsequent action, even for the same cause, if it appears that the prior judgment was rendered on demurrer. It makes no difference in the application of the principle, whether the facts upon which the court proceeded were proved by competent evidence or whether they were confessed or admitted by the parties; an admission even by way of demurrer to a pleading in which facts are alleged, is just as available to the opposite party as if the admission was made *ore tenus* before a jury.<sup>1</sup>

§ 272. Whether general or special, a demurrer admits all such matters of fact as are sufficiently pleaded, and to that extent it is a direct admission that the facts as alleged are true. Where the objection is to matter of substance, a general demurrer is suffi-

<sup>1</sup> Bouchard v. Diaz, 3 Den. 244; West, 7 Wall. 99; Goodrich v. Chicago, Perkins v. Moore, 16 Ala. 17; Robinson 5 Wall. 573; Beloit v. Morgan, 7 Wall. v. Howard, 5 Cal. 428; Aurora v. 619.

cient ; but where it is to matter of form only, a special demurrer is necessary. Demurrers are either general or special : general, when no particular cause is alleged ; special, when the particular imperfection is pointed out and insisted upon as the ground of demurrer. The former will suffice when the pleading is defective in substance, and the latter is requisite where the objection is only to the form of the pleading. The meaning of this rule is, that the party, having had his option whether to plead or demur, shall be taken, in adopting the latter alternative, to admit that he has no ground for denial or traverse. It is, therefore, an admission that the facts alleged are true.<sup>1</sup> And, therefore, the only question for the court is whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged ; if the matter of fact be not sufficiently pleaded the demurrer is no admission.<sup>2</sup> A demurrer does not admit the accuracy of an alleged construction of an instrument, when the instrument is set forth in the record, if the alleged construction is not supported by the terms of the instrument.<sup>3</sup> Nor can a demurrer be held to work an admission that parol evidence is admissible to enlarge or contradict a sealed instrument which has become a matter of record in a judicial proceeding.<sup>4</sup> Mere averments of a legal conclusion are not admitted by a demurrer unless the facts and circumstances set forth are sufficient to sustain the allegation,<sup>5</sup> but

<sup>1</sup> *Nolan v. Geddes*, 1 East, 634; *Gundry v. Feltham*, 1 T. R. 334; *Gas Co. v. Turner*, 6 Bing. N. C. 324; *Tyler v. Bland*, 9 M. & W. 338; *Tancied v. Algood*, 4 H. & N. 438; *Dillon v. Barnard*, 21 Wall. 430; *Ford v. Peering*, 1 Ves. Ch. 71; *Lea v. Robeson*, 12 Gray, 280; *Redmond v. v. Dickerson*, 9 N. J. Eq. 507; *U. S. v. Ames*, 99 U. S. 45; *Murray v. Clarendon*, L. R. 9 Eq. 17; *Nesbitt v. Bertridge*, 8 L. T. N. S. 76; *Eaton v. Southby*, Willes, 181; *P. M. Gen'l v. Ustrick*, 4 Wash. C. C. 437; *Christman v. Russell*, 5 Wall. 290.

<sup>2</sup> *Duncan v. Twhaites*, 3 B. & C. 584.

<sup>3</sup> *Ford v. Peering*, 1 Ves. Jr. 78; *Lea v. Robinson*, 12 Gray, 280; *Red-*

*mond v. Dickerson*, 9 N. J. Eq. 507; *Green v. Dodge*, 1 Ohio, 80.

<sup>4</sup> *Beckham v. Drake*, 9 M. & W. 78; *Humble v. Hunter*, L. R. 12 Q. B. 315; *McArdle v. Iodine Co.*, 15 Ir. C. L. 146; *Sprigg v. Bank*, 14 Pet. 201; *U. S. v. Ames*, 99 U. S. 45.

<sup>5</sup> *Nesbitt v. Bertridge*, 8 Law T. N. S. 76; *Murray v. Clarendon*, L. R. 9 Eq. 11; *Ellis v. Coleman*, 25 Beav. 662; *Robertson v. Smith*, 18 Johns. 459; *Ward v. Johnson*, 13 Mass. 148; *Cowley v. Patch*, 120 Mass. 137; *Smith v. Black*, 9 S. & R. 142; *Leltzhoover v. Commonwealth*, 1 Watts, 126; *U. S. v. Ames*, 99 U. S. 45; *Dillon v. Barnard*, 21 Wall. 430; *Evan v. Avon*, 6 Jur. N. S. 1361; *Williams v. Stewart*, 3 Mer. 472; *East*

there is this difference to be observed between judgments on verdicts and judgments on demurrer : the former are certain as to what was intended to be decided, however inartificially drawn, whereas the latter are often of very doubtful construction, leaving it difficult to determine whether the judgment was intended to sustain the demurrer as to all matters demurred to, or only partially.

§ 273. A judgment on demurrer is conclusive of everything necessarily determined by such judgment ; such a judgment may be on the merits, and if so, its effect is as conclusive as though the facts set forth in the complaint were admitted by the parties or established by evidence ; as no action could be maintained by the plaintiff on the same facts in case judgment be against him, so, if any court err in sustaining a demurrer and entering judgment for defendant thereon, when the complaint is sufficient, the judgment is nevertheless on the merits. It is final and conclusive until reversed on appeal. Thus in an action by the State against four defendants, claiming damages for a fraudulent combination and conspiracy in obtaining a contract from the State, it appeared on the trial that the State had commenced a previous action against two of them for the same cause, in which a demurrer was interposed by the defendants upon three grounds, two of the grounds not going to the merits of the action, and the other involving the merits, and judgment had been rendered for the defendants on the demurrer ; the judgment was a bar to the present action. The acts of the two defendants set out in the complaint in such former action being identically the same as those contained in the complaint in the second action, and charged therein as done in confederacy and combination with the additional defendants in the second action, not sued in the former. The two additional defendants not previously sued being in privity with the two defendants in the former action, the estoppel in their favor was just as effectual as in favor of the two defendants in the former action.<sup>1</sup> A judgment rendered on demurrer to the declaration, or to a material pleading, setting

India Co. v. Henchman, 1 Ves. Jr. 291; Co., 91 U. S. 526.

Penfold v. Nunn, 5 Sim. 405; Earle <sup>1</sup> People v. Stephens, 51 How. P  
v. Holt, 5 Hare, 130; Gould v. R. R. 235.

forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record: as to the facts thus established they can never after be contested between the same parties or their privies. If the judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless.<sup>1</sup> But if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in his second suit, the judgment in the first action is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of that cause, as disclosed in the second declaration, were not heard and decided in the first.

§ 274. A judgment upon demurrer is a bar to another action between the same parties upon the same facts, the sufficiency of which was put in issue by the demurrer.<sup>2</sup> If it appears by the record that the point in controversy was necessarily decided in

<sup>1</sup> *Ferrer v. Arden*, 2 Cro. Eliz. 668; *Ferreis' Case*, 6 Co. 7; *Bouchard v. Dias*, 3 Denio, 243; *Robinson v. Howard*, 5 Cal. 428; *Perkins v. Moore*, 16 Ala. 17; *Gray v. Gray*, 34 Ga. 499; *Wilson v. Ray*, 24 Ind. 156, *Estep v. Haish*, 21 Ind. 190; *Terry v. Hammond*, 47 Cal. 32; *Bank, &c. v. Welden*, 1 La. Ann. 46; *Keater v. Hock*, 16 Iowa, 23; *Coffin v. Knott*, 2 Greene (Ia.) 582; *Gould v. R. R. Co.*, 91 U. S. 526; *Nishel v. Laparte*, 74 Ill. 306; *Griffin v. Seymour*, 15 Iowa, 80; *Terry v. Hammond*, 47 Cal. 32; *Lampen v. Kedgewin*, 1 Mod. 207; *Vallandigham v. Ryan*, 17 Ill. 25; *Clearwater v. Meredith*, 1 Wall. 25; *Aurora v.*

*West*, 7 Wall. 82; *Hitchin v. Campbell*, 2 W. Bl. 831; *Nowlan v. Geddes*, 1 East, 634; *Goodrich v. Chicago*, 5 Wall. 573; *Rex v. Kingston*, 20 St. Trials, 588; *Ricardo v. Garcias*, 12 Cl. & F. 400, *Gilman v. Rives*, 10 Pet. 298; *Richardson v. Baiton*, 24 How. 188; *Jordan v. Fancloth*, 34 Ga. 47; *McGiinnis v. Judges*, 30 Ga. 47; *Spicer v. U. S.*, 5 Ct. of Cl. 34; *Stowell v. Chamberlain*, 60 N. Y. 372; *Sloan v. Cooper*, 54 Ga. 486.

<sup>2</sup> *Felt v. Turnure*, 48 Iowa, 397; *Los Angeles v. Mellus*, 58 Cal. 16; *Johnson v. Pate*, 90 N. C. 334; *Dion v. Zadek*, 59 Tex. 529; *Brown v. District*, 19 Ct. of Cl. 445; *State v. Krug*, 94

the first suit, whether upon a demurrer or the facts in issue, it cannot be again considered in any subsequent suit.<sup>1</sup> Where a demurrer to a bill in equity is overruled, and the court take under advisement, the kind of decree to be entered, the sufficiency of the bill is *res adjudicata*, and no longer open to discussion.<sup>2</sup> Thus, where a petition on a cause of action, appearing on its face to be barred by the statute of limitations, is demurred to for that reason, and the demurrer sustained, and another suit is subsequently brought upon the same cause of action, the petition therein alleging facts, showing that the statute of limitations has not run, the latter suit cannot be maintained, as the judgment upon the demurrer in the first suit, although error, was a former adjudication and a bar to any other suit.<sup>3</sup>

In a judgment on demurrer, if the reason to be collected from the record appears to have been matter of form, it cannot be pleaded in bar;<sup>4</sup> when a judgment that is rendered on demurrer and the parties are still left in court, it must be obvious that such a judgment cannot be available as an estoppel, nor preclude a trial on the merits.<sup>5</sup>

§ 275. The conclusive effect of a judicial decision cannot be extended by argument, inference or implication, to matters which were not actually heard or determined.<sup>6</sup> In one case<sup>7</sup> the matter

Ind. 366; *Smith v. Hornsby*, 70 Ga. 552; *Tankersley v. Pettis*, 71 Ala. 179; *Strang v. Moog*, 73 Ala. 467.

<sup>1</sup> *Mining Co. v. Coal Co.*, 10 W. Va. 250; *Corville v. Gilman*, 13 W. Va. 314; *Beckwith v. Thompson*, 18 W. Va. 103; *Griffin v. Seymour*, 15 Iowa, 30; *Coriothers v. Sargent*, 20 W. Va. 351.

<sup>2</sup> *Johnson v. Sandford*, 13 Conn. 461.

<sup>3</sup> *Price v. Bonfield*, 2 Wyo. 80.

<sup>4</sup> *Jacobs v. Graham*, 1 Blackf. 392.

<sup>5</sup> *Reg. v. Birmingham*, 3 Q. B. 223; *Aurora v. West*, 7 Wall. 90; *Commonwealth v. Goddard*, 13 Mass. 456; *Chapin v. Curtis*, 23 Conn. 388; *Foster v. Commonwealth*, 8 W. & S. 77; *Griffin v. Seymour*, 15 Iowa, 30;

*Crumpton v. State*, 43 Ala. 31; *Rawls v. State*, 16 Miss. 599; *Harding v. State*, 22 Ark. 210; *Robinson v. Howard*, 5 Cal. 428; *Gerrish v. Brewer*, 6 Minn. 53; *Gilman v. Rives*, 10 Pet. 298; *Nickelson v. Ingram*, 24 Tex. 630; *Birch v. Funk*, 2 Met. (Ky.) 544; *Well v. Moore*, 49 Mo. 229; *Spicer v. U. S.*, 5 N. & H. 34.

<sup>6</sup> *Mallett v. Foxcroft*, 1 Story, 474; *Spooner v. Davis*, 7 Pick. 147; *Ihmssen v. Ormsby*, 32 Pa. St. 198; *Tams v. Lewis*, 42 Pa. St. 402; *Lentz v. Wallace*, 17 Pa. St. 412; *Bennett v. Holmes*, 1 D. & B. 486; *Chamberlain v. Gaillard*, 26 Ala. 504; *Felton v. Smith*, 88 Ind. 149.

<sup>7</sup> *Merserau v. Pearsal*, 19 N. Y. 103.

in controversy was whether the defendant had obstructed the working of a mill by building and raising a dam; the court held that he could not escape from the estoppel of a former judgment in regard to the same mill, on the ground that he had obtained a verdict and judgment in another action brought by the plaintiff for an injury alleged to have been occasioned to another mill for the same cause; evidence was adduced that the mills were both on the same level, and that one could not have been injured or interfered with by the water backing on it, unless the other was likewise injured, for the reason that such an inference might be probable or certain; still while there was no inconsistency in the verdicts, they were each conclusive in its own sphere. The celebrated case of the Duchess of Kingston is probably as familiar to every practitioner who has ever had an action in which the question of estoppel arose, as Blackstone or Kent's Commentaries; in fact, it is the leading case on the question of estoppels by record, and from it, has been deduced the well-settled and universal principle that a judgment is not evidence of any matter which came collaterally in question, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment; and there are no exceptions to the rule.<sup>1</sup> Collateral or incidental questions which must naturally arise in and during the litigation of every controversy do not become a part of the action by being given in evidence, or because they are brought to the notice of the court; while, on the

<sup>1</sup> Wood v. Jackson, 8 Wend. 35; Hopkins v. Lee, 6 Wheat. 109; Lewis's Appeal, 67 Pa. St. 153; Lawrence v. Hunt, 10 Wend. 80; Jackson v. Wood, 3 Wend. 27; Dixon v. Merritt, 21 Minn. 196; San Francisco v. Water Works, 39 Cal. 473; Haight v. Keokuk, 4 Ia. 199; Felton v. Smith, 88 Ind. 149; Vaughn v. Morrison, 55 N. H. 580; Colbert v. Bell, 53 Ga. 554; King v. Chase, 15 N. H. 9; Sheldon v. Patterson, 55 Ill. 507; Bank v. Bank, 7 Gill, 415; Laud v. Keim, 52 Miss. 341; Fluker v. Herbert, 27 La. Ann. 284; State v.

Ramsburg, 43 Md. 325; Brown v. Ramsberg, 43 Md. 560, Jones v. Lavender, 55 Ga. 228; Davenport v. Barrett, 51 Ind. 329; Ehle v. Bingham, 7 Barb. 494; Wales v. Lyon, 2 Mich. 276; Walker v. Fuller, 29 Ark. 448; Cannon v. Brame, 45 Ala. 262; Ihmsen v. Ormsby, 32 Pa. St. 198; Tams v. Lewis, 42 Pa. St. 482; Lore v. Truman, 10 Ohio S. 45; Lentz v. Wallace, 16 Pa. St. 412; Martin v. Gernandt, 19 Pa. St. 121; Finley v. Hanbest, 30 Pa. St. 190; Hibbsman v. Duleban, 4 Watts, 183; Ridgley v. Stillwell, 37 Mo. 128; Smith v. Weeks, 26 Barb. 463; State v. Biscoe, 17 Ark. 142.

contrary, matters that are and might be well pleaded, and, if they were, would constitute a good plea, are neither incidental or collateral, and constitute an essential part of the cause of action or defense; and it is on this ground that a judgment is conclusive, not only of the right which it affirms or denies, but of all the questions which were material and necessary to be determined during the pendency of the litigation.<sup>1</sup>

§ 276. A recovery in an action of tort, *without satisfaction*, does not invest the defendant with the title to the property, and consequently is no estoppel in a subsequent action of the same kind against one who claims under him.<sup>2</sup> Thus, in trespass, or for torts generally, nothing is conclusively settled but the point or points directly in issue. Thus in trespass, upon not guilty pleaded, the title is not concluded, though if the title is put in issue by a plea of soil or freehold, the verdict will be conclusive on the title in another action of trespass for an injury done to the same land. So, in actions on the case for interruptions of rights and other easements; on the general issue, the title is not settled, though if the defendant plead a title in bar, and issue is taken on it, the verdict will settle that point for future actions.<sup>3</sup>

When a judgment is used in pleading as a technical estoppel, or relied upon by way of evidence as something conclusive, *per se*, between the parties, it must appear by the record of the prior suit that the particular controversy so sought to be precluded was there necessarily tried and determined. If in such cases the record shows that such judgment could not have been rendered without deciding a particular matter, it will be considered as

<sup>1</sup> Garwood v. Garwood, 29 Cal. 521; King v. Chase, 15 N. H. 9; Hill v. Morse, 61 Me. 545; Wood v. Jackson, 3 Wend. 27; Chamberlain v. Gaillard, 26 Ala. 504; Jennison v. West Springfield, 13 Gray, 514; Roberts v. Heim, 27 Ala. 618; Hammer v. Griffiths, 1 Grant Cas. 193, Lawrence v. Hunt, 10 Wend. 80; Tarleton v. Pollard, 25 Ala. 300; Sawyer v. Woodbury, 7 Gray, 502.

<sup>2</sup> Spivey v. Morris, 18 Ala. 254;

Smith v. Alexander, 4 Sneed, 432; Drake v. Mitchell, 3 East, 251; Curtis v. Groat, 6 Johns. 168; Osterhout v. Roberts, 8 Cowen, 43; Sanderson v. Caldwell, 2 Aik. 203; Jones v. McNeil, 2 Port. 466.

<sup>3</sup> Standish v. Parker, 2 Pick. 20; Smith v. Sherwood, 4 Conn. 282; Church v. Leavenworth, 4 Conn. 277; Richmond v. Hays, 2 Pa. St. 492; Richardson v. Boston, 19 How. 163; Cortlandt v. Willis, 19 Ohio, 142; Diek v. Webster, 6 Wis. 481.

having determined that particular matter in all future litigations, otherwise not. A judgment for the plaintiff in assumpsit expressly determines that the defendant owes the plaintiff a sum certain, which the latter is entitled to recover by execution. But, in an action on a note, if a judgment is rendered against the defendant on a plea of *non est factum*, the judgment in effect is not merely that the plaintiff shall recover the amount found due by the judgment, but that the defendant made the note. If the execution of a deed in fee be put in issue in an action of trespass, and expressly found by the jury, the verdict and judgment may be relied upon as conclusive evidence of that fact in the trial of a real action or writ of right between the same parties, for the same estate. It becomes a fixed fact between the parties, for all purposes.<sup>1</sup> So the construction given to a deed in a former suit, in which the parties acquiesced, and from which they took no appeal, is binding in any subsequent suit between the same parties growing out of the same instrument.<sup>2</sup>

§ 277. It is not the *recovery*, but the *matter alleged* by the party on which *the recovery proceeds*, that creates the estoppel;<sup>3</sup> and it was said that the recovery of damages in one action was not only a bar to another recovery for the same injury, but the estoppel went further, and established the right on which the recovery was founded. In one case, two notes had been given for the sale of a vessel; on one of the notes suit was brought in the Marine Court in the City of New York, where the defendant pleaded the general issue, and gave notice of a total failure of consideration, because of fraud in the sale of the vessel, and on that ground succeeded in his defense. In a subsequent action on the other note, the defendant offered in evidence the record of the former action, and the Supreme Court held that the record, with proof *aliunde*, that the fraud in the transaction was the ground on which the judgment had been rendered, and was conclusive

<sup>1</sup> Sawyer v. Woodbury, 7 Gray, 499; Scott v. Luther, 44 Iowa, 570; Bell v. McColloch, 31 Ohio S. 397; Thew v. Porcelain, &c. Co., 8 S. C. 286; Ander-

son v. Lewis, 20 Ga. 383.

<sup>2</sup> Oursler v. R. R. Co., 60 Md. 358.

<sup>3</sup> Outram v. Morewood, 3 East, 125; Duncan v. Holcomb, 26 Ind. 378; Fluker v. Herbert, 27 La. Ann. 284.

against the plaintiff.<sup>1</sup> In delivering the opinion of the court, Woodworth, J., citing the *Duchess of Kingston's* case, said, "that the rule there laid down had not been departed from in any of the courts of that State; that from the record of the former suit, it cannot be inferred whether the two suits were founded on the same or a different state of facts. It is true that the record merely proves the pleadings, and that the judgment was rendered for the defendant; without other proof, it would not make out a defense. The record shows that it was competent on the trial to establish the fraud of the plaintiff; whether the fraud was made out, and whether that was the point upon which the decision was founded, must necessarily be proved by evidence extrinsic, the record; to do so is not inconsistent with the record, nor does it impugn its verity. The jury must have passed upon the fraud; it was directly in question. Scott testified that the unseaworthiness was not disclosed at the time of the sale to the defendant. The inquiry was then solely directed to the question, Was the vessel unseaworthy, and had the plaintiff knowledge of that fact when he sold? By the finding of the jury, both propositions are affirmed. The judgment became conclusive between the parties on these points, and is an effectual bar to an action to recover the residue of the purchase money." So, when an action was prosecuted to set aside a contract on the ground of fraud, and to cancel an unmatured note given in pursuance of the contract, which resulted in a judgment affirming the validity of the contract and note; in a subsequent action on the note, the defendant is estopped, by the judgment in the former action, from setting up that the contract and note were executed by the parties under a mutual mistake.<sup>2</sup> So, in an action against B., on his contract guaranteeing the payment of the purchase money of certain land, A. recovered judgment for the first installment. In a subsequent action for the remaining ones, B. set up the same defense as in the first suit—that the contract was induced by fraudulent representations of A. as to the quantity of timber on the land, which, he alleged, amounted to a breach of warranty, for

<sup>1</sup> *Gardner v. Buckbee*, 3 Cow. 120; 286; *Foster v. Konkright*, 70 Ind. Bell v. McColloch, 31 Ohio S. 397; 123.

*Thew v. Porcelain, &c. Co.*, 8 S. C. <sup>2</sup> *Bell v. McColloch*, 31 Ohio S. 397; *Foster v. Konkrite*, 70 Ind. 123.

which he was entitled to recoup the damages sustained. The judgment having been rendered that such representations were not made, is conclusive as to the facts found in all subsequent controversies between the parties on the contract.<sup>1</sup>

§ 278. The estoppel of a former adjudication will, however, only extend as far as the subject-matter, in the second action, is substantially the same as the first, and may be conclusive on some points, while leaving others open to controversy.<sup>2</sup> Hence, a verdict and judgment for the defendant, on the general issue, pleaded, in which the plaintiff claimed damages resulting from the defendant's wrongfully raising his mill-dam, will not estop the same plaintiff in another action for damages from alleging the same act as the occasion of his sustaining subsequent damages, because the former judgments may have been rendered on the ground that the plaintiff was not damaged, or had released his cause of action, or had given the defendant the right to do the act complained of, and did not necessarily determine the defendant's right to raise his dam, and continue it in that state.<sup>3</sup> So, a verdict for the plaintiff in an action *quare clausum fregit* will estop the defendant from alleging the same title in a subsequent action of ejectment: but if the defendant, after the rendition of the judgment, acquires title by purchase, he is not estopped from alleging that fact.<sup>4</sup>

§ 279. In order that a judgment in one action shall be conclusive in another, it must appear with convenient certainty that the question in controversy in the second suit was litigated and decided in the first.<sup>5</sup> When this appears on the face of the pro-

<sup>1</sup> Lumber Co. v. Buchtel, 101 U. S. 638; Felton v. Smith, 88 Ind. 149. But as to a partial defense to one of several notes, see Felton v. Smith, 88 Ind. 149.

<sup>2</sup> Breunier v. Bigelow, 8 Kas. 496; McKissick v. McKissick, 6 Humph. 75; Nickerson v. California, &c. Co., 10 Cal. 520; Parker v. Standish, 3 Pick. 288; Neafie v. Neafie, 7 Johns. Ch. 71.

<sup>3</sup> Shafer v. Stonebraker, 4 Gill & J.

345; Killheffer v. Herr, 17 S. & R. 319; Shepherd v. Wallace, 19 Ohio, 322; Grant v. Ramsey, 7 Ohio St. 159.

<sup>4</sup> Burt v. Sternbergh, 4 Cow. 359; Niven v. Steven, 5 Harr. 272; Shettlesworth v. Hughey, 9 Rich. L. 387; Warwick v. Underwood, 3 Head, 238; Whittaker v. Jackson, 2 H. & C. 926.

<sup>5</sup> Supples v. Cannon, 44 Conn. 424; Love v. Truman, 10 Ohio S. 45; Perry v. Lewis, 49 Miss. 443; Whiteman v. Boston, &c. Co., 15 Gray, 530.

ceedings in the former action, the mere production of the record will be enough. A judgment record, which is responsive to the issues necessarily involved, cannot be controlled by proof of what was or was not tried;<sup>1</sup> but where, as often happens, it is not, it must be shown *aliunde* by parol evidence, and the burden of proof rests on the party who maintains the affirmative.<sup>2</sup> Although a different opinion has been expressed in other instances, and the presumption said to be, that a debt or demand which might have been given in evidence, under the pleadings in a former action, was actually laid before the jury.<sup>3</sup> "When," said Abbott, C. J., in *Bagot v. Williams*, "the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the party who brings the second action to show that they are not the same." The question is one which hardly admits of any general rule, but would seem to depend on whether the cause of action in the second suit was *prima facie* the same as that on which judgment was had in the first; for when it is not, their identity cannot be presumed in the absence of proof.<sup>4</sup> And hence, a recovery on the money counts, and for goods sold and delivered, will not bar a subsequent suit on a promissory note, merely because the note might have been given for the price of the goods, nor without sufficient evidence that it was.<sup>5</sup> But where judgment on a suit on an account is released by the attorney of record, for a much less sum than its face, the judgment will bar a suit on a note given for the account.<sup>6</sup> The question whether the same matters could have been litigated in both actions, must be determined solely by the record;<sup>7</sup> but if it shows that they might,

<sup>1</sup> *Trimmier v. Thomson*, 19 S. C. 247; *Armstrong v. St. Louis*, 69 Mo. 309.

<sup>2</sup> *R. R. Co. v. Clark*, 21 Ind. 150; *Hargus v. Goodman*, 12 Ind. 629; *Standish v. Parker*, 2 Pick. 20; *Tutt v. Price*, 7 Mo. App. 194; *Goodenow v. Litchfield*, 59 Ia. 226; *Cummings v. Colgrove*, 25 Pa. St. 150; *Bennett v. Holmes*, 1 D. & B. 486; *Strother v. Butler*, 17 Ala. 733; *Doty v. Brown*, 4 N. Y. 71; *Davis v. Talcott*, 14 Barb. 611; *Smalley v. Edey*,

19 Ill. 207; *Atwood v. Robbins*, 35 Vt. 530.

<sup>3</sup> *Budger v. Titcomb*, 15 Pick. 409; *Baggott v. Williams*, 3 B. & C. 235; *Agnew v. McElroy*, 18 Miss. 552.

<sup>4</sup> *Hughes v. Alexander*, 5 Duer, 488; *Secor v. Sturges*, 16 N. Y. 548.

<sup>5</sup> *Cummings v. Colgrove*, 25 Pa. St. 150.

<sup>6</sup> *Fogg v. Sanborn*, 48 Me. 432.

<sup>7</sup> *Campbell v. Butts*, 3 N. Y. 173; *Young v. Black*, 7 Cranch, 565; *Chapman v. Smith*, 16 How. 114; *Rogers*

then the fact that they were actually decided, may, and often must be, proved by extrinsic evidence.<sup>1</sup> It is the policy of the law to prevent the repetition of suits between the same parties, for the same subject-matter; and a party is not allowed to recover twice for the same cause of action; and in order that parties may avail themselves of the defense of a former recovery, there should be reasonable certainty in all pleadings. From the multiplicity and variety of the causes of action, it is impracticable to establish rules of pleading that will enable the courts to ascertain from the record alone, in all cases, whether a second suit is identical with the first. Therefore such a defense is not confined to a mere estoppel by the record, but may be proven by evidence, as any other issue. The identity of the first and second actions is not determined alone by the pleadings, but by proof. Parties may not choose in the conduct of a suit to present their pleadings in such definite forms as to enable the court to determine the identity of two suits. In adjudicating upon a pending suit, the primary duty of the court is to determine from the proceedings the corresponding rights of the litigants therein involved. Whether the pleadings are of such a character, as to prevent another suit for the same matter, is of secondary consideration. The courts may dispose of the case before them, but they cannot provide against all future controversy between the parties; so that the question, whether the same matter is involved in a future suit, must depend upon the proof to be adduced at its trial.

*v. Libby*, 35 Me. 200; *Chamberlain v. Gaillard*, 26 Ala. 504; *Demerit v. Lyford*, 27 N. H. 541; *Nanny v. Harris*, 2 Johns. 24; *Young v. Rummell*, 2 Hill, 481; *Burdick v. Post*, 12 Barb. 168; *Standish v. Parker*, 2 Pick. 20.

<sup>1</sup> *Young v. Rummell*, 2 Hill, 478; *Gray v. Gillian*, 15 Ill. 453; *Littleton v. Richardson*, 34 N. H. 179; *Briggs v. Wells*, 12 Barb. 567; *Royce v. Burt*, 42 Barb. 339; *Babcock v. Camp*, 12 Ohio S. 11; *Taylor v. Dustin*, 43 N. H. 493; *King v. Chase*, 15 N. H. 9; *Foster v. Wells*, 4 Tex. 101; *Walker v. Chase*, 53 Me. 253; *Wood v. Jackson*, 8 Wend. 9; *Young v. Black*, 7

*Cranch*, 565; *Driscoll v. Damp*, 16 Wis. 106; *Vallandigham v. Ryan*, 17 Ill. 25; *Hill v. Freeman*, 1 Ga. 211; *State v. Morton*, 18 Mo. 53; *Brown v. King*, 10 Mo. 56; *Amesden v. R. R. Co.*, 33 Iowa, 88; *Emery v. Fowler*, 39 Me. 536; *Carr v. Woodruff*, 6 Jones L. 400; *Chamberlain v. Gaillard*, 26 Ala. 504; *Dunckel v. Wiles*, 11 N. Y. 420; *Harris v. Harris*, 36 Barb. 88; *Lawrence v. Hunt*, 10 Wend. 80; *Gardner v. Buckbee*, 3 Cow. 120; *Eastman v. Cooper*, 15 Pick. 276; *Felton v. Smith*, 88 Ind. 149; *Kiern v. Ainsworth*, 95 Pa. St. 310; *Smith v. Smith*, 70 N. Y. 634,

§ 280. A judgment on the merits, in a personal action, is a bar to another action, though the form of the two actions is not the same.<sup>1</sup> A judgment will be regarded as rendered "on the merits," so as to operate as an estoppel, if the *status* of the action was such that the parties might have had their lawsuit disposed of according to their respective rights, if they had presented all the evidence, and the court had properly understood the facts, and correctly applied the law.<sup>2</sup> Thus, where a party brought suit in a court of common pleas against an administrator, and judgment has been rendered in favor of the defendant, he can not afterwards prove up his claim against the estate of the decedent in the probate court; both courts being of concurrent jurisdiction, the judgment estops him. It is the same cause of action where the same evidence will support both actions, though grounded on different writs,<sup>3</sup> and if a court of civil jurisdiction render a general verdict for the defendant, the presumption is that the whole case was decided, and not merely a particular branch of it.<sup>4</sup> But it is only where the merits have been passed upon, or from the course of pleadings and trial that a judgment bars a subsequent suit; and in a case where the plaintiff failed

<sup>1</sup> Buck v. Collins, 69 Me. 445; Caylus v. R. R. Co., 76 N. Y. 609; Roberts, in re, 59 How. Pr. 136; Smith v. Smith, 79 N. Y. 634; Cleve v. Powell, 1 M. & R. 228; Kitchen v. Campbell, 2 Ala. 830; Routledge v. Hislop, 2 E. & E. 549; Flitters v. Allfrey, L. R. 10 C. P. 29; Bank v. Rude, 23 Kans. 123, Hartson v. Shanklin, 58 Cal. 248; Gordinier's Appeal 59 Pa. St. 528; Louis v. Trustees, 109 U. S. 162, Roberts, in re, 59 How. Pr. 136; State v. Booth, 68 Mo. 546; Schrauth v. Bank, 8 Daly, 106; Goodenow v. Litchfield 59 Iowa, 226; Thurstout v. Crafter, 2 Bl. 827; Slade's case, 4 Co. 94; Gibbs v. Cruickshank, L. R. 8 C. P. 454; Phillips v. Berryman, 3 Dougl. 286; King v. Chase, 15 N. H. 9, Doty v. Brown, 4 N. Y. 71; Agnew v. McElroy, 18 Miss. 532. Young v. Black, 7 Cranch, 565; Pinney v. Barnes, 12

Conn. 420; Green v. Clark, 5 Denio, 497; Sergeant, in re, 17 Vt. 425.

<sup>2</sup> Finney v. Finney, 1 P. & D. 483, Eastman v. Cooper, 15 Pick. 285, Hitchin v. Campbell, 2 W. Bl. 778; Dyer's Appeal, 3 Grant Case, 326, Ferrer's Case, 6 Co. 7.

<sup>3</sup> Bell v. Hoagland, 15 Mo. 360; Houston v. Musgrove, 35 Tex. 594; Taylor v. Larkin, 15 Mo. 360; Baker v. Rand, 13 Barb. 152; Birkhead v. Brown, 5 Sand. 134; Miller v. Maurice, 6 Hill, 114; Chapman v. Smith, 16 How. 114; Shears v. Dusenbury, 13 Gray, 292; Hitchin v. Campbell, 3 Wils. 304; Marsh v. Pier, 4 Rawle, 188; Whelan v. Hill, 2 Whart. 119, Burke v. Miller, 4 Gray, 114; Rice v. King, 7 Johns, 21; Lawrence v. Vernon, 3 Sumn. 20.

<sup>4</sup> Stockton v. Ford, 19 How. 418; Forniquet v. Perkins, 7 How. 160.

to appear, and his suit was abated and dismissed, and the judgment was that the defendant recover five dollars and costs, it was held that this was no more than a nonsuit, and not a bar to a subsequent action on the merits.<sup>1</sup> The dismissal of a former suit on the plaintiff's motion cannot be pleaded in bar to another action. So, a verdict on which no judgment is rendered, is not an estoppel.<sup>2</sup> Thus, an intervenor dismissing his petition before the final submission is not estopped by the judgment from insisting upon the matters contained in his petition of intervention.<sup>3</sup> Thus, special findings of the jury in an action at law, not confirmed by a judgment of the court, nor involved in the general verdict, are not conclusive of the facts found, on either party, in a trial before another jury in the same or another suit.<sup>4</sup> It is only where the point in issue has been determined that the judgment is a bar. If the suit is discontinued, or for any other cause there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive.<sup>5</sup> So also, to render a former judgment a complete bar, it must appear to have been a decision upon the merits, and this will be sufficient though the declaration was essentially defective, and would have been bad on demurrer.<sup>6</sup> But if the trial went off on a technical defect,<sup>7</sup>

<sup>1</sup> *Kendall v. Talbot*, 1 A. K. Marsh, 321; *Birch v. Funk*, 2 Met. (Ky.) 544; *Merritt v. Campbell*, 47 Cal. 542; *Stevens v. Dunbar*, 1 Blackf. 56; *Griffin v. Seymour*, 15 Iowa, 30; *Delaney v. Reed*, 4 Iowa, 292; *Clark v. Young*, 1 Cranch, 181; *Haw v. Tierman*, 53 Pa. St. 192.

<sup>2</sup> *Wood v. Jackson*, 8 Wend. 9; *Rex v. St. Anne*, 9 Q. B. 884; *Greely v. Smith*, 1 W. & M. 181; *Knox v. Waldborough*, 5 Me. 185; *Hull v. Blake*, 13 Mass. 155; *Sweigart v. Berk*, 8 S. & R. 305; *Bridge v. Sumner*, 1 Pick. 371; *Harvey v. Richards*, 2 Gall. 231; *Ridgely v. Spencer*, 2 Binn. 70; *Reed v. Proprietors*, 8 How. 274; *Holbert's Estate*, 51 Cal. 257.

<sup>3</sup> *Dalhoff v. Coffman*, 37 Iowa, 283.

<sup>4</sup> *Hawks v. Truesdell*, 99 Mass. 557.

<sup>5</sup> *Delaney v. Reade*, 4 Ia 292;

*Rankin v. Barnes*, 5 Bush, 20; *Wheeler v. Ruckman*, 51 N. Y. 391; *Miller v. Maus*, 28 Md 194; *Holland v. Hatch*, 5 Bush, 20; *Marsh v. Hammond*, 11 Allen, 483; *Jones v. Howard*, 3 Allen, 223; *Greely v. Smith*, 1 W. & M. 181; *Comins v. Tuck*, 20 Pick. 336; *Morgan v. Bliss*, 2 Mass. 111; *Knox v. Waldborough*, 5 Me. 185; *Derby v. Jacques*, 1 Cliff, 425.

<sup>6</sup> *Hughes v. Blake*, 1 Mason, 515.

<sup>7</sup> *Homer v. Brown*, 16 How. 354; *Lane v. Harrison*, 6 Munf. 573; *McDonald v. Rainor*, 8 Johns. 442; *Lepping v. Kedgewin*, 1 Mod. 207; *Bridge v. Sumner*, 1 Pick. 371; *Morgan v. Bliss*, 2 Mass. 113; *Derby v. Jacques*, 1 Cliff. 425; *Knox v. Waldborough*, 5 Me. 185, *Howes v. Austin*, 35 Ill 396; *Allinet v. Creditors*, 15 La. Ann. 130; *Jones v. Walker*, 5 Yerg. 428,

or because the debt was not yet due.<sup>1</sup> As where a purchaser of land brought a suit to recover the purchase money, before he had been evicted, and for that reason was defeated, that judgment can not be pleaded in a subsequent suit brought for the same object after eviction,<sup>2</sup> or because the court had no jurisdiction,<sup>3</sup> or because of a temporary disability of the plaintiff to sue,<sup>4</sup> or on the ground of formal defects in a pleading,<sup>5</sup> or if the judgment has been reversed in error which cannot be proved by the record, or the like, the judgment will be no bar to a future action, and the estoppel of a judgment will be set at large by the award of a new trial. But a judgment against one of several makers of a note, without process against the others, is a bar to a suit against those who were not parties to the first action. Where an action of trover is brought, after a judgment in trespass, if title to the property was set up by the defendant in the first action, and it was found for him, it is clearly a bar to a second action for the same chattel, even though brought against one not a party to the former suit, but an accomplice in the original taking. So, a judgment for the defendant in trover upon trial of the merits, is a bar to an action for money had and received for the money arising from the sale of the same goods.<sup>6</sup> But, where the plaintiff recovers judgment in trespass, without satisfaction, he is not estopped from afterward maintaining trover against another per-

Brintnall v. Foster, 7 Wend. 103; Holland v. Hatch, 15 Ohio S. 464; Foster v. Wells, 4 Tex. 101; Pillow v. Elliott, 25 Tex. Sup. 322; Taylor v. Laikin, 12 Mo. 103; Greely v. Smith, 1 W. & M. 181; Harvey v. Large, 51 Barb. 322; Bank v. Mariposa Co., 7 Rob. (N. Y.) 225; Audubon v. Ins. Co., 27 N. Y. 216; People v. Vilas, 36 N. Y. 460; Harrison v. Wood, 2 Duer, 50.

<sup>1</sup> Bank v. Lewis, 8 Pick. 113.

<sup>2</sup> Huist v. Means, 2 Sneed, 546.

<sup>3</sup> Estill v. Taul, 2 Yerg. 467; Gray v. Hodge, 50 Ga. 262; Gordon v. Kennedy, 36 Iowa, 167.

<sup>4</sup> Dixon v. Sinclair, 4 Vt. 354. Where an equitable defense was dismissed, without being presented to

the court a judgment was held no bar to a subsequent action, begun in due time, embracing the subject of the equitable defense. McCreary v. Casey, 45 Cal. 128.

<sup>5</sup> Wells v. Moore, 49 Mo. 229; Huston v. Musgrove, 35 Tex. 594; Witcher v. Oldham, 4 Sneed, 220; Lacon v. Barnard, Cro. Car. 35; Ferreirs v. Arden, 2 Vent. 668; Lechmere v. Toplady, 2 Vent. 169.

<sup>6</sup> Agnew v. McElroy, 18 Miss. 552; Kerr v. Welsh, 9 Rich. Eq. 369; Hopkinson v. Shelton, 1 Ala. 303; R. R. Co. v. Traube, 50 Mo. 355; Johnson v. Smith, 8 Johns. 383; Caylus v. R. R., 76 N. Y. 609; Howell v. Earp, 21 Hun, 393.

son for the same goods, for the reason that the principle of *transit in rem judicatum* extends no further than to bar another action for the same cause against the same party; the original judgment can imply nothing more than a promise by the defendant to pay the amount, and an agreement by the plaintiff that, upon payment of the money by the defendant, the chattel shall be his own; it is contrary to justice, and the analogies of the law to deprive a man of his property without satisfaction, unless by his express consent. *Solutio pretii emptionis loco habetur.*<sup>1</sup>

§ 281. But where, from the nature of the two actions, the cause of action cannot be the same in both, no averment will be received to the contrary. Therefore, in a writ of right, a plea in bar that the same title had been the sole subject of litigation in a former action of trespass, *quare clausum fregit*, or in a former writ of entry, between the same parties, or others privy in estate, was held to be a bad plea.<sup>2</sup> A judgment in an action of trespass, upon the issue *liberum tenementum*, is admissible in a subsequent action of ejectment between the same parties.<sup>3</sup>

§ 282. A judgment may be admissible in evidence to establish its own existence and acts consequent upon it, in cases where it cannot be used as an estoppel.<sup>4</sup> So a judgment may be used to show that the suit was determined, or, in a proper cause, to prove the amount which a principal has been compelled to pay for the default of his agent, or the amount which a surety has been compelled to pay for the principal debtor, and, in general, to show the fact that the judgment was actually rendered at such a time and for such an amount.<sup>5</sup> For example, a surety may introduce a judgment against himself in an action against his principal, in order to show that he has been forced to pay, and

<sup>1</sup> *Adams v. Broughton*, 2 Stra. 1078; *Lovejoy v. Murray*, 3 Wall. 1; *Shakers v. Underwood*, 11 Bush, 265; *Hopkinson v. Shelton*, 1 Ala. 303.

<sup>2</sup> *Arnold v. Arnold*, 17 Pick. 4; *Bates v. Thompson*, 17 Pick. 14; *Bennett v. Holmes*, 1 Dev. & Bat. 486.

<sup>3</sup> *Hoey v. Furman*, 1 Pa. St. 295; *Nivin v. Steven*, 5 Harr. 272; *Stevens*

*v. Hughes*, 31 Pa. St. 381.

<sup>4</sup> *Garver v. Commonwealth*, 7 Pa. St. 265; *Haight v. Haight*, 19 N. Y. 464; *Key v. Test*, 14 Md. 86; *Smith v. Chapin*, 31 Conn. 530; *Rinchey v. Stryker*, 28 N. Y. 45; *Chamberlain v. Carlisle*, 26 N. H. 540.

<sup>5</sup> *Lock v. Winston*, 10 Ala. 849; *King v. Chase*, 15 N. H. 9; *Green v. New River Co.*, 4 T. R. 589.

the extent of the damage, and while a judgment against a master for the tortious act of his servant establishes conclusively the amount of the loss resulting from the act, it does not have the same conclusive effect as to the nature of the act itself.<sup>1</sup> If all the parties in being, having an interest in the subject-matter of the bill, are made parties, a decree construing a will will be binding upon after-born children who may be entitled as remainder-men; and powers exercised under such construction by the executor, in good faith, will be sustained, especially in favor of innocent purchasers.<sup>2</sup>

§ 283. A record may also be admitted in evidence in favor of a stranger, against one of the parties, as containing a solemn admission or judicial declaration by such party in regard to a certain fact. But in that case it is admitted, not as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself, that the fact was so. It is, therefore, to be treated in accordance with the principles governing admissions, to which class of evidence it properly belongs. Thus, where a carrier brought trover against a person to whom he had delivered the goods entrusted to him, and which were lost, the record in the suit was held admissible for the owner in a subsequent action brought by him against the carrier, as amounting to a confession in a court of record, that he had the plaintiff's goods.<sup>3</sup> So, also, when the plaintiff, in an action of trespass *quare clausum fregit*, claimed title by disseisin, against a grantee of the heirs of the disseisee, it was held, that the count in a writ of right sued by those heirs against him might be given in evidence as their declaration and admission that their ancestor died disseised, and that the present plaintiff was in possession.<sup>4</sup> So where two had been sued as partners, and had suffered judgment, the record was held competent evi-

<sup>1</sup> Bank v. Babcock, 5 Hill, 152; McClure v. Whitesides, 2 Ind. 573; Green v. New River Co., 4 T. R. 589; R. R. Co. v. Smith, 7 Dana, 245; Huddlekauf v. Smith, 1 Md. 329; Doris v. State, 13 Pa. St. 140; R. R. Co. v. Welch, 24 Ill. 31; Fletcher v. Jackson, 23 Vt. 581; Littleton v.

Richardson, 34 N. H. 179.

<sup>2</sup> Freeman v. Freeman, 9 Heisk. 306; Parker v. Peters.

<sup>3</sup> Parsons v. Copeland, 33 Me. 370; Tiley v. Cowling, <sup>1</sup> Lord Raymond, 741; Ins. Co. v. Cravens, 69 Mo. 72.

<sup>4</sup> Robinson v. Swett, 3 Me. 316; Wells v. Compton, 3 Rob. (La.) 171.

dence of an admission of partnership in a subsequent action brought by a third person against them as partners.<sup>1</sup>

§ 284. Where separate actions are brought against several defendants for the same single act of trespass, the party last sued may plead the pendency of the first in abatement, and a recovery of one of several parties to a joint tort frequently estops the plaintiff from proceeding against any other party not included in such action. Thus in an action against one for a battery, or for taking away the plaintiff's posts, or destroying grass in field, where several persons are concerned, the recovery against one will be a bar to an action against the others, and in these cases the court will, in general, in a summary application, stay the proceedings in a second action, where it is manifest that the entire damage might have been recovered in the first. It is a good defense, by way of satisfaction, to an action against several persons, that a former action was brought against them and another, a sum of money accepted from him, and the suit dropped.<sup>2</sup> A party against whom a judgment has been rendered on a verdict cannot, while the judgment remains in force, maintain an action against the other party jointly with others alleging that said verdict was unjust and false, and was procured by them by fraud and perjury, and by a conspiracy to effect that purpose. He is estopped by the judgment.<sup>3</sup>

§ 285. The effect of what occurs, in one judicial proceeding upon another, is sometimes due to the principles of estoppel *in pais*, rather than by record. A man who obtains or defeats a judgment by pleading, or representing an act or adjudication in one aspect, is estopped from giving it a different and inconsistent character in another suit founded upon the same subject matter. Pleading a former judgment as an estoppel, or taking advantage of it in any other way, will estop its being reversed on error; or alleging that it was fraudulent

<sup>1</sup> Craig v. Carleton, 22 Me. 492; Dutton v. Woodman, 9 Cush. 255.

<sup>2</sup> Dufresne v. Hutchinson, 3 Taunt. 117; Ross v. Webber, 26 Ill. 221.

<sup>3</sup> Dunlap v. Glidden, 31 Me. 435; Campbell v. Strong, 1 Hemp. 265;

Kelly v. Mize, 3 Sneed, 59; Field v. Saunderson, 34 Mo. 542, Hillsborough v. Nichols, 46 N. H. 379, Dampart v. Sympson, Cro. Eliz. 520; Eyres v. Sedgwick, Cro. Jac. 601; Lyford v. Demeitt, 32 N. H. 234.

or void. A party who leads a plaintiff to believe that he has given a recognizance for the appearance of the defendant, cannot subsequently show that the recognizance is void.<sup>1</sup> A party accepting a judgment in his favor cannot reject the conditions on which it is made.<sup>2</sup> Nor can he afterwards ask that the judgment be reviewed, or deny the authority which granted it.<sup>3</sup> Having received the benefit, he must bear the burdens which it impose, and where a party recognizes a judgment by appealing from it, he is estopped from attacking it for irregularity in its rendition.<sup>4</sup> The legal assertion of a right acquired by the judgment of a court of competent jurisdiction, made in due course of law, will estop the party in all proceedings thereafter to invalidate the judgment under which the asserted right has been claimed.<sup>5</sup> Thus, a woman will be estopped from appealing from a decree of divorce, by suing her husband in replevin for certain personal property and recovering judgment against him, as if she was sole. So, where parties agree that a judgment may be credited upon a note as part payment, a subsequent determination that the judgment is void by a court of equity, in a proceeding to which both are parties, will not affect the credit.<sup>6</sup> So, where an officer collects money on a process issued to him, he cannot in an action against him for such money, by the party entitled thereto, deny the validity of the judgment on which the process was issued.<sup>7</sup> Where parties obtain an order in court, as leave to amend a com-

<sup>1</sup> *Hayward v. Duff*, 12 C. B. N. S. 364; *Bailey v. Bailey*, 44 Pa. St. 274; *Hitchcock v. Danbury, &c. Co.*, 25 Conn. 516; *Bank v. Eldred*, 6 Biss. 370; *Irwin v. Nuckolls*, 3 Neb. 441; *Tinkler v. Holder*, 7 D. & L. 61; *Radway v. Graham*, 4 Abb. P. 465; *Strong v. Irwin*, 12 Neb. 446; *Mariner v. Milwaukee, &c. Co.*, 26 Wis. 85; *Ross v. South Western, &c. Co.*, 53 Ga. 514; *Matlow v. Cox*, 25 Tex. 578; *Ogden v. Rowley*, 15 Ind. 56; *Mitchell, in re*, De G. B. Cas. 257; *Ruckman v. Alwood*, 44 Ill. 183; *Tinkler v. Hilder*, 4 Exchq. 187; *Montague v. Smith*, 13 Mass. 396; *Wils v. Kane*, 2 Grant's Cas. 60; *Altoona v. Delaware*,

44 Iowa, 201.

<sup>2</sup> *Ewing v. Filley*, 43 Pa. St. 384; *Brien v. Weld*, 15 N. B. R. 405; *McFarland v. Rogers*, 1 Wis. 453.

<sup>3</sup> *Bradner v. Howard*, 75 N. Y. 417; *Blackin v. Zeller*, 52 Barb. 147; *Ruckman v. Alwood*, 44 Ill. 183; *Holt v. Rees*, 46 Ill. 181; *Himmelman v. Sullivan*, 40 Cal. 125; *Blessey v. Kearney*, 24 La. Ann. 289.

<sup>4</sup> *Irwin v. Nuckolls*, 3 Neb. 441.

<sup>5</sup> *Baily v. Baily*, 44 Pa. St. 274; *Lucas v. Bank, &c.*, 2 Stew. 280; *Martin v. Ives*, 17 S. & R. 364.

<sup>6</sup> *Young v. Fugett*, 1 Tex. L. J. 342.

<sup>7</sup> *Eaton v. Cooper*, 29 Vt. 444; *West v. Meserve*, 17 N. H. 432; *Elliott*

plaint, having taken the benefit of the order by amending their complaint under it, cannot repudiate by appeal or by motion so much of it as allows a demurrer.<sup>1</sup>

§ 286. If a party read the cross-examination of a witness, examined *de bene esse*, it estops him from objecting to his competency to testify.<sup>2</sup> So, where a deposition is commented on by the Supreme court, and partly made the basis of their opinion, a motion to suppress it on the ground of irrelevancy, can not be made after the remandment of the cause.<sup>3</sup> And one, who, in various legal proceedings, has treated certain parties as the assignees of a bankrupt, is estopped from denying their title, in a subsequent suit;<sup>4</sup> where a matter is directly in issue and determined in a court of common law, the judgment may be set up as an estoppel in a court of admiralty.<sup>5</sup> So, a party intervening as mortgagee in a suit on a bottomry bond is estopped from claiming the surplus as owner, against the borrower.<sup>6</sup> So, a ship which has received a cargo, carried it to its destination, and libelled it for freight, is estopped from denying her responsibility for damages to it in *transitu*.<sup>7</sup> So, in an action on a bond for the prison bounds, the defendant is estopped from denying the existence of the original judgment.<sup>8</sup> In an action an attachment was issued, and the defendant's property seized; he gave a delivery bond, with surety. Upon the defendant's motion the case was certified to an appellate court. The defendant took various steps in the appellate court, and then withdrew his appearance; when a judgment by default was rendered against him, and an order made for the sale of the attached property. In an action on the bond the defendant and surety were estopped to deny the juris-

v. Cronk, 13 Wend. 35; Billings v. Russell, 23 Pa. St. 189; Diehl v. Holben, 39 Pa. St. 213.

<sup>1</sup> Bennett v. Van Syckel, 18 N. Y. 481; Marvin v. Marvin, 11 Abb. P. (N. S.) 97; Radway v. Graham, 4 Abb. P. (N. S.) 468; Lewis v. Irving, 15 Abb. (N. S.) 140; Wallace v. Castle, 68 N. Y. 375; Briggs v. Howe, 3 Keyes, 166; Smith v. Rathbun, 75 N. Y. 122.

<sup>2</sup> The Osceola, Olcott's Rep. 450; Blight v. Banks, 6 Mon. 92, Pardon v. Dwire, 23 Ill. 572; Crowther v. Rowlandson, 27 Cal. 376.

<sup>3</sup> Lanier v. Hill, 30 Ala. 111.

<sup>4</sup> Stokes v. Mowatt, 1 U. S. L. J. 309.

<sup>5</sup> Goodrich v. Chicago, 5 Wall. 566.

<sup>6</sup> The Panama, Olcott, 343.

<sup>7</sup> Water Witch, 1 Bl. 494.

<sup>8</sup> Allen v. McGruder, 3 Cr. C. C. 6.

diction of the court in the attachment proceeding.<sup>1</sup> In an action on such bond the parties signing are precluded from disputing its existence or the genuineness of the record.<sup>2</sup> An heir, not under disability, taking letters testamentary and making a final settlement, or appearing by attorney at the probate of the will, receiving the share, and executing deeds of confirmation, is estopped from questioning the validity of the probate and of the issuance of the letters.<sup>3</sup>

§ 287. A party who has recovered a judgment upon a claim which is indivisible, and has, after its rendition, coerced by execution full satisfaction, cannot maintain an appeal, upon the ground that he has not recovered enough. This rule applies to judgments in equity, as well as at law. Having elected to collect his judgment, he ratified it, and is estopped from prosecuting an appeal as inconsistent with his collection of the amount adjudged to him.<sup>4</sup> A plaintiff is estopped from suing out a writ of error, on a judgment whereon he had caused an execution to be issued and returned satisfied in full, and his attorney's receipt in full indorsed thereon. He cannot treat the judgment as both right and wrong.<sup>5</sup> Where, upon an appeal, a cause has been remanded, and the parties have made a voluntary settlement of the case by making mutual concessions, and have fully performed its stipulations, such agreement precludes a reconsideration of the case in the appellate court.<sup>6</sup> Where a party has two or more remedies for the same wrong, in which the measure of damages might be different, electing one and pursuing it to judgment is a bar to any other remedy.<sup>7</sup> Thus, where he has elected to sue on a contract

<sup>1</sup> *Bowen v. Reed*, 34 Ind. 430.

<sup>2</sup> *Adams v. Olive*, 48 Ala. 551.

<sup>3</sup> *O'Dell v. Rogers*, 44 Wis. 126.

<sup>4</sup> *Paine v. Woolley*, 80 Ky. 568.

<sup>5</sup> *Matlow v. Cox*, 25 Texas, 583.

<sup>6</sup> *Jeter v. Jeter*, 36 Ala. 391.

<sup>7</sup> *Walsh v. Canal Co.*, 59 Md. 423; *Beall v. Pearre*, 12 Md. 566; *Wall v. Percival*, 61 Me. 391; *Dunker v. Tufts*, 57 Me. 417; *Sweet v. Brackley*, 53 Me. 346; *Holbrook v. Foss*, 27 Me. 441; *Goodrich v. Yale*, 97 Mass. 15;

*Bennett v. Hood*, 1 Allen, 47; *Smith v. Way*, 9 Allen, 472; *Warren v. Cummings*, 6 Cush. 103; *Norton v. Doheny*, 3 Gray, 372; *Martin v. Boyce*, 49 Mich. 123; *Nield v. Burton*, 49 Mich. 53; *Nichols v. Gage*, 10 Oreg. 82; *Handley v. Kelley*, 62 Cal. 155; *Wells v. Robinson*, 13 Cal. 141; *O'Donald v. Constant*, 82 Ind. 212; *Buchanan v. Dorsey*, 11 Neb. 373; *Haralson v. George*, 56 Ala. 295; *Milroy v. Mining Co.*, 43 Mich. 231; *Phillips v.*

as it is, and has been defeated, he can not afterwards maintain an action to reform the contract, and this, though the first action was in a Federal court and the subsequent in a State court.<sup>1</sup> One who, being made a party defendant to a foreclosure suit, answers, denying the mortgagor's title, and praying that the mortgage be adjudged void, and contests the same on the trial, is precluded from afterwards denying the power of the court to pass upon the issue thus presented.<sup>2</sup> So, after a judgment is rendered on defective service, which the party could have set aside on a proper proceeding therefor, but fails to, but appeals from such judgment and gives an appeal or supersedeas bond, which is filed and approved, it is a recognition of the judgment and a submission to the jurisdiction of the court which estops the party from controverting the jurisdiction of the court rendering the judgment.<sup>3</sup> Where a mortgagee has obtained a decree of foreclosure against a corporation, he is estopped to deny that the instrument is the mortgage of the corporation;<sup>4</sup> so in ejectment by one who, at an attachment sale, had purchased the entire equity in land, and had obtained a decree for conveyance of the outstanding legal title, the defendant, heir of the vendor of the holder of the title, was estopped from objecting that the attachment sale was void because the attachment suit was discontinued before condemnation of the land.<sup>5</sup> Where the defendant in a suit in ejectment files a bill in equity for an injunction to stay proceedings in said suit, and in his bill of complaint, which was sworn to, avers that the legal title to the land in controversy is vested in the plaintiff, and that he, the defendant, "is powerless to defend himself against the said action of ejectment, according to the strict rules of the common law, and is remediless in the premises, save in a court of equity, where such matters are properly cognizable," he is estopped from setting up title to said property by adverse possession.<sup>6</sup>

Myers, 55 Iowa, 265; Finn v. Peck, 47 Mich. 248, Bank v. Pinkers, 83 N. C. 377; Steinbach v. Ins. Co., 77 N. Y. 498; Caylus v. R. R. Co., 76 N. Y. 609; Howell v. Earp, 21 Hun, 393; Thompson v. Myrick, 24 Minn. 4.

<sup>1</sup> Steinbach v. Ins. Co., *supra*.

<sup>2</sup> Lounsbury v. Catron, 8 Neb. 469.

<sup>3</sup> Haas v. Lees, 18 Ks. 449; Fee v. Big Sandy Co., 13 Ohio S. 503.

<sup>4</sup> Johnson v. Gobson, 78 Ind. 232.

<sup>5</sup> Hooker v. Yale, 56 Miss. 197.

<sup>6</sup> Mobberly v. Mobberly, 60 Md. 376.

§ 288. Where, upon the trial of a cause, negotiations leading to the entry of a verdict and judgment by consent, are conducted by one of the counsel of each of the respective parties, openly in court, where all are present, the party in whose favor the verdict and judgment are entered cannot repudiate the terms under which they were offered and accepted, and at the same time enjoy their benefit.<sup>1</sup> So, where a judgment was rendered after answer, and was subsequently acquiesced in by the defendant, by payment of interest and promise to pay such judgment, and the party suffered it to be executed, without opposing its execution by suit, such party is estopped and cannot attack the judgment, or what was legally done under it.<sup>2</sup> So, one of the parties to a judgment rendered upon a compromise denied its validity, on the ground that the compromise had been made by his attorney, in violation of instructions. It appeared, however, that he became aware of all the facts the same day that the judgment was entered, but permitted the term to elapse without taking any step to set it aside; it was conclusive upon him.<sup>3</sup> So one who voluntarily pays a judgment and accepts a deed thereunder, cannot afterwards be heard to dispute the validity of the judgment,<sup>4</sup> and where a party accepts the proceeds of a judgment, it is a complete satisfaction for damages arising out of the same cause,<sup>5</sup> and waives his right of appeal.<sup>6</sup> So, where a party commences an action against another, and brings him into court upon service of summons, he cannot move to set aside the proceedings against such party on the ground "he has not the right to stand in justice or the capacity therefor." The motion, coming from the party who originally called the defendant into court, cannot be entertained.<sup>7</sup> So, if by consent a judge acts, not according to the course of law, but as an arbitrator, and his decision, therefore, is not subject to appeal, yet if one party has appealed from the decision he cannot object to an appeal by the other party.<sup>8</sup> So, where the de-

<sup>1</sup> *Frauenthal's Appeal*, 100 Pa. St. 290.

<sup>2</sup> *Cane v. Sewall*, 34 La. Ann. 1096.

<sup>3</sup> *Black v. Rogers*, 75 Mo. 441; *Maraist v. Caillier*, 30 La. Ann. 1087.

<sup>4</sup> *Wolf v. McMahon*, 26 Kas. 141.

<sup>5</sup> *Lewis v. Boston*, 130 Mass. 339.

<sup>6</sup> *Hamilton v. Bailey*, 12 Neb. 56.

<sup>7</sup> *Baker v. Michinard*, 17 La. Ann. 251.

<sup>8</sup> *Bicket v. Morris*, L. R. 1 H. L. Sc. 47.

fendants succeeded in obtaining judgment by impeaching a bond, they were held estopped from relying on the same bond as a defense in another action brought by the same plaintiff, on the principle that a party who desires to affirm what he might avoid cannot after his affirmance retract to the injury of others. These instances cited sustain the rule that the effect of what takes place in one judicial proceeding upon another, is attributed to equitable rather than legal or technical estoppel, and a party who obtains or defeats a judgment by pleading or representing a thing or judgment in one aspect is estopped from giving it another in a suit founded upon the same subject-matter.<sup>1</sup>

§ 289. This was the rule of the civil law, from which there have been but few exceptions. It is thus stated: "*Actione autē civilī, q̄ sunt in rē, aliæ datæ sunt sup̄ ipsa possessione, aliæ p̄ditæ super ipsa Sprietate. Et si super eadem re uni p̄tenti competāt plures actiones sicut assisa novæ disseysinæ mortis antecessoris super possessione & breve de ingressu & breve de recto super proprietate, simul & semel omnibus uti non poterit, sed unam eliḡ eligat q̄a voluerit & una electa nunq̄ habebit regressum ad alias, pendente illa q̄ si ad aliam recurrat, impetratio de secund non valebit. Cum autem actione in rem quis semel recesserit, vel ab actione, se retraxerit, vel judicium contrarium habuerit, numqua ad eandem redire poterit, cum semel actio extincta*

<sup>1</sup> R. R. Co. v. Howard, 13 How. 307; Marsh v. Pier, 4 Rawle, 273; Herndon v. Moore, 18 S. C. 339; Frauenthal's App., 100 Pa. St. 290; Johnson v. Gibson, 78 Ind. 282; Carlsle v. Foster, 10 Ohio S. 198; Ogden v. Rowley, 15 Ind. 56; Regina v. Sandwich, 10 Q. B. 563; Martin v. Ives, 17 S. & R. 364; Ware v. Lisa, 34 Mo. 505; Rankin v. Jones, 2 Jones Eq. 169; Bradner v. Howard, 75 N. Y. 417; Hayes v. Gurdykunst, 10 Pa. St. 220; Vanick v. Edwards, 11 Paige, 289; Brantley v. Kee, 5 Jones Eq. 332; Wills v. Kane, 2 Grant Cas. 60; Scagg v. R. R. Co., 10 Md. 268; Banks v. Ammon, 27 Pa. St. 172; Hawley v. Middlebrook, 27 Conn. 527; Chapman v. Chatman, 24 Ga.

393; Jackson &c. v. Holland, 14 Fla. 384; Bank v. Bank, 50 N. Y. 575; U. S. v. Ames, 99 U. S. 35; Hooker v. Hubbard, 102 Mass. 239; Bank v. Packet Co., 35 Iowa, 226; Crockett v. La-hbrook, 5 T. B. Mon. 530; Milton v. Mumford, 3 Hawks, 483; Polhill v. Walter, 3 B. & A. 114; Hall v. White, 3 C. & P. 136; Doe v. Lambly, 2 Esp. 635; Hill v. Huckabee, 70 Ala. 153; Kiern v. Ainsworth, 95 Pa. St. 310; Trustees v. Williams, 9 Wend. 147; Brooks v. Ankeny, 7 Oreg. 461. And see post, ch. XII, as to Judicial Admissions, Payment of Money into court, Tender, &c., and ch. XVII. for other instances of Estoppel by Election.

*non reviviscit. Si autem ex quacunque causa a brevi se retraxerat pro aliquo defectu & non ab actione, aliud erit.*" So, where a party is sued by a wrong name, is served with process, and fails to plead the misnomer in abatement, the judgment will bind him.<sup>1</sup>

<sup>1</sup> *Ins Co. v. French*, 18 How. 404; *nard v. Heysinger*, 15 Ill 288; *Baker McCreery v. Everding*, 54 Cal. 168; *v. Bessy*, 73 Me. 473; *Deems v. Canal R. R. Co. v. Burness*, 82 Ind. 83; *Line*, 14 Blatch. 474; *State v. Telephone Co.*, 36 Ohio St. 296.

## CHAPTER V.

## JUDGMENTS IN REM.

SECTION 290. A judgment *in rem* is a judgment of a court of exclusive, or at least peculiar, jurisdiction, declaratory either of the nature and condition of some particular thing, or the condition or *status* of some particular person; or, perhaps, a better definition is, that it is an adjudication pronounced upon the *status* of some particular thing, or subject matter, by a tribunal having competent authority for that purpose, such an adjudication being a most solemn declaration of a court of competent jurisdiction that the *status* of the thing adjudicated upon *ipso facto*, renders it such as it declares it to be, and estops and precludes all persons from denying that the *status* of the thing operated upon is not what the court has declared it to be,<sup>1</sup> and such judgments are conclusive not only upon parties and privies, but upon strangers. In fact, a judgment *in rem* is conclusive against the whole world.<sup>2</sup> The rule that estoppels are only binding on parties and privies does not apply in cases of judgments *in rem*, where the law acts directly on the thing itself, and renders it that which the judgment declares it to be.<sup>3</sup> The term judgment *in rem*, strictly speaking, is somewhat objectionable when applied to the status of a person. The term itself is derived from the civil law, where actions were classed as *actiones in personam*, and *actiones in rem*. The former including actions upon contract or for injuries "*ex contractu vel ex maleficio*," while the latter referred to actions in which some particular thing was the subject matter of the controversy. "*Cum movet alicui de aliquare con-*

<sup>1</sup> Cammell v. Sewell, 3 H. & N. 617; Simpson v. Fogo, 29 L. J. Ch. 667; Castrique v. Imrie, 8 C. B. N. S. 1.

<sup>2</sup> Lord v. Chidbourne, 42 Me. 429;

Fry v. Taylor, 1 Head, 594; State v. R. R. Co., 10 Nev. 47; Street v. Ins. Co., 12 Rich. L. 13.

<sup>3</sup> Loid v. Chidbourne, 42 Me. 429; Cammell v. Sewell, 3 H. & N. 617; R. R. Co. v. Hemphill, 35 Mo. 111.

*troversiam*," under the Roman law generally, a judgment *in rem* was, "*in rem ipsam restituat (possessor) cum fructibus*."<sup>1</sup>

§ 291. In the case of *Woodruff v. Taylor*,<sup>2</sup> the distinction between judgments *in rem* and *in personam* is so clearly and ably laid down that I cannot do better than quote from it. "The effect and purpose of a proceeding *in rem* is to ascertain the right of every possible claimant; and it is instituted on an allegation that the title of the former owner, whoever he may be, has become divested, and notice is given to the whole world to appear and make claim to it. From the nature of the case, the notice is constructive only to the greater part of the world; but it is such as the law presumes will be most likely to reach the persons interested, and as such does, in point of fact, generally reach them. In case of seizure for violation of our revenue laws, the substance of the libel on which the forfeiture is claimed, with the order of the court thereon, specifying the time and place of trial, is to be published in a newspaper and to be posted up a certain number of days, and proclamation is also made in court for all persons interested to appear and contest the forfeiture. In every court, and in all countries, whose judgments are respected, notice of some kind is given. It is just as essential to the validity of a judgment *in rem* that constructive notice should appear at least to have been given, as that actual notice should appear in a record of a judgment *in personam*. A proceeding, professing to determine the right of property, where no notice, actual or constructive, is given, whatever else it might be called, would not entitle it to be dignified with the name of a judicial proceeding. It would be an arbitrary edict, not to be regarded anywhere as the judgment of a court."

§ 292. "A judgment *in rem* is an adjudication, pronounced upon the status of some particular subject matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this, that the latter judgment is in form as well as substance between the parties claiming the right, that it is so *inter partes* appears by the record itself. It is binding upon the parties appearing to be such by the record, and

<sup>1</sup> Inst. Lib. 4, Titles 16, 17, §§ 1, 2.

<sup>2</sup> 20 Vermont, 65.

those claiming under or by them. A judgment *in rem* is founded on a proceeding, not as against the person, as such, but against the thing or subject matter itself, whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself, and the judgment is a solemn declaration upon the status of the thing, and it *ipso facto* renders it what it declares it to be.

§ 293. The probate of a will is a familiar instance of a judgment *in rem*. The proceeding is in form and substance upon the will itself. No process is issued against any one in determining the state or condition of the instrument, but all persons are notified by a newspaper advertisement to appear and contest the probate, and the judgment is not that this or that person shall pay a sum of money or do any particular act, but that the instrument is or is not the will of the testator. It determines the status of the subject matter of the proceeding. The judgment is upon the thing itself, and when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument (as to all the world, at least, so far as the property within the state is concerned) just what the judgment of the court declares it ought to be.<sup>1</sup> This is one instance of a proceeding upon a written instrument to determine its state or condition, and that determination in its consequences involves and incidentally determines the rights of individuals to property affected by it.

§ 294. A decree of the United States District Court adjudging a debtor to be bankrupt is in the nature of a decree *in rem* as respects the status of the party, and in case the court rendering it has jurisdiction it is only assailable by a direct proceeding in a competent court, if due notice was given and the adjudica-

<sup>1</sup> Colton v. Ross, 2 Paige, 396; State v. McGlynn, 20 Cal. 234; Kerrick v. Bransby, 7 Brown's Cas. 437; Jones v. Jones, 7 Price, 663; Jones v. Frost, 1 Jacobs, 466; Pemberton v. Pemberton, 13 Ves. 290; Adams v. De Cook, 1 McAll. 253; Brock v.

Frank, 51 Ala. 85; James v. Williams, 31 Ark. 175; Stephen v. Ellis, 35 Mich. 446; Broderick's will, 21 Wall. 503; Leland, in re, 16 B. R. 505; Whicher v. Hume, 7 H. L. Cas. 124; Ballou v. Hudson, 13 Gratt. 682; Deland v. Harrington, 29 Ala. 95; Woodruff v. Taylor, 20 Vt. 65.

tion is correct in form.<sup>1</sup> So a decree for the sale of the estate of a lunatic is a decree *in rem* and binding upon creditors.<sup>2</sup>

§ 295. Proceedings *in rem* may be and often are upon personal chattels directly declaring the right to them in such cases. The proceeding is for the supposed violation by the property (so to speak) of some public law or regulation by which it is alleged that the title of the former owner has become divested. The property being seized, a proceeding is then instituted against it upon an allegation stating the cause for which it has been forfeited, upon which public notice is given in some prescribed form to all persons to appear and contest the allegation. It is by no means certain that all persons having an interest in the property have actual notice of the proceeding; but if the thing itself upon which the proceeding is had be within the jurisdiction of the court, all persons interested are held to have constructive notice, and the sentence or decree of the court declaring the state or condition of the property is conclusive upon all the world. A sale of the property under such a sentence passes the right absolutely, and, further, in cases of judgments in courts of admiralty they are also conclusive evidence of the facts stated in the decree to have been found by the courts as the basis of the decree, so the judgments of municipal courts acting *in rem* within the sphere of their jurisdiction would have the same effect.

§ 296. Under the term judgment *in rem* are included judgments of courts of admiralty relating to a prize or a judgment of condemnation, confiscation or forfeiture under the revenue or excise laws, and the judgments of all other courts directly upon the personal status or relations of the party, such as marriage, divorce, bastardy, settlement, an adjudication by a competent

<sup>1</sup> Way v. Howe, 108 Mass. 502; Wieland, in re, L. R. 5 Ch. App. 486; Woodruff v. Taylor, 20 Vt. 65; Man-kin v. Chandler, 2 Brock. 125; Shawhan v. Wherrett, 7 How. 627; Imrie v. Castrique, 8 C. B. N. S. 407; Carter v. Dimmick, 4 H. L. Cas. 346; Hamp-  
ton v. McConnell, 3 Wheat. 334; Nations v. Johnson, 24 How. 195; D'Arcy v. Ketchum, 11 How. 165; Webster v. Reid, 11 How. 437. See Ante, Ch. IV. §§ 248, 249, 250, 251.

<sup>2</sup> Latham v. Wiswall 2 Ired. Ch 204

tribunal of a question of descent or pedigree.<sup>1</sup> The decision of a court of probate, orphans' courts, guardians' courts, courts of ordinary, surrogates' courts, courts martial, ecclesiastical and spiritual courts, courts having probate jurisdiction upon the validity of a will.<sup>2</sup> The settlement of the accounts of an administrator, executor or guardian,<sup>3</sup> or a court having jurisdiction in bankruptcy or insolvency matters, as an order discharging the person or estate of a bankrupt from the obligation of his debts,<sup>4</sup> estops all parties from disputing the point decreed, whether they were or were not parties to the proceeding in which the decree was made. So a judgment or decree regarding the legal status or authority of parties.<sup>5</sup> Thus a decision of the Senate of New Hampshire that a person claiming a seat as senator was duly elected, &c., can not be questioned by the executive or judicial departments. For they operate precisely like a judgment of condemnation or forfeiture in rendering the person what they pronounce him to be, as the grant of letters testamentary or administration,<sup>6</sup> the appointment of a guardian,<sup>7</sup> or the naturalization of an alien,<sup>8</sup> or the adjudication or settlement of a pauper;<sup>9</sup> and in many States proceedings to foreclose tax liens, the proceedings are *in rem* against the land, and all persons are interested and bound by the judgment.<sup>10</sup>

<sup>1</sup> Ennis v. Smith, 14 How. 401; Hood v. Hood, 110 Mass. 463; Burlen v. Shannon, 3 Gray, 387; Smith v. Smith, 13 Gray, 209.

<sup>2</sup> Dublin v. Chadburn, 16 Mass. 433; Laughton v. Atkins, 1 Pick. 535; Hodges v. Banham, 8 Yerger, 186; Vanderford v. Van Valkenburg, 6 N. Y. 190; Holliday v. Ward, 19 Pa. St. 485; Lovett v. Mathews, 24 Pa. St. 333; Shinn v. Holmes, 25 Pa. 142; Slemmer's Appeal, 44 Pa. St. 396; Schultz v. Schultz, 14 Gratt. 358; Box v. Laurence, 14 Tex. 345; Peters v. Ins Co., 3 Sumner, 389; Herbert v. Hanrick, 16 Ala. 581; Wills v. Sprague, 3 Gratt. 355; Judson v. Lake, 3 Conn. 318; Dickenson v. Hayes, 31 Conn. 417.

<sup>3</sup> Tibbetts v. Tilton, 24 N. H. 120; Bryant v. Allen, 6 N. H. 116; Clark v. Callahan, 2 Watts, 259.

<sup>4</sup> Meriam v. Sewall, 8 Gray, 316; Livermore v. Swasey, 7 Mass. 213; Bellows, in re, 3 Story C. C. 128; Very v. McHenry, 28 Me. 206.

<sup>5</sup> Opinion of Justices, 56 N. H. 570; Co. Litt. 352 b.

<sup>6</sup> Laurence v. Englesby, 24 Vt. 42; Stein v. Bennett, 24 Vt. 303; Rayland v. Green, 22 Miss. 104.

<sup>7</sup> Farrar v. Olmsted, 24 Vt. 123.

<sup>8</sup> McCarthy v. Marsh, 5 N. Y. 263; State v. Penny, 10 Ark. 631.

<sup>9</sup> Reg. v. Hartington, 4 Ell. & B. 780; Reg. v. Wye, 7 A. & E. 761.

<sup>10</sup> Pritchard v. Madden, 24 Kas 486.

§ 297. In regard to courts of admiralty or prize the very nature of the question of prize is beyond the jurisdiction of common law and state courts, for the reason that the jurisdiction is exclusively vested in courts of admiralty, which in this country are United States courts whose jurisdiction alone can extend on the high seas. The Federal courts have exclusive jurisdiction of all seizures, whether made on land or water, for a breach of the laws of the United States, while the admiralty jurisdiction of the district courts extends to all cases of seizure in waters navigable by vessels of ten or more tons burthen, therefore they must be conclusive on all other courts. In the English courts of exchequer, as well as in American courts, where proceedings *in rem* have been commenced, it is conclusive evidence to any other court as well as to all the world that the goods are liable to be seized, for the reason that by the judgment of condemnation the title to the property is irrevocably changed and vested in the government; it is the judgment of condemnation that changes the title and not the act of seizure,<sup>1</sup> therefore a judgment in an admiralty or prize court condemning a vessel as enemy's property or for violation of international law, binds the property though obtained without notice to the party interested, and is final and conclusive upon all other courts; and a sale made in pursuance thereof vests an indefeasible title in the purchaser against the world, no matter how deficient the title may have been of the parties who were in possession of the vessel through whose acts the forfeiture was occasioned,<sup>2</sup> and it follows as a necessary consequence that there can be no action maintained either in trespass or trover for taking the property.<sup>3</sup>

§ 297a. In *Scott v. Shearman*, the court in its opinion by Justice Blackstone, said: "The only possible ground that the plaintiff can rely on in the present case, which is unaccompanied with

<sup>1</sup> *Cook v. Howard*, 13 Johns. 276; *Le Caux v. Eden*, 2 Doug. 614.

<sup>2</sup> *Hughes v. Cornelius*, 2 Show. 232; *Rio Grande, The*, 23 Wall. 458; *Penhallow v. Doane*, 3 Dall. 54; *Buchanan v. Briggs*, 2 Yeates, 232; *Rose v. Huntley*, 4 Cranch, 291; *The*

*Globe*, 2 Bl. C. C. 427; *Bradstreet v. Ins. Co.*, 3 Sum. 600; *Crousdon v. Leonard*, 4 Cranch, 494.

<sup>3</sup> *Scott v. Shearman*, 2 Wm. Bl. 977; *Geyer v. Aguilar*, 7 T. R. 696; *Lane v. Degberg*, Bullers N. P. 244; *Whitney v. Walsh*, 1 Cush. 29; *Gelston v. Hoyt*, 13 Johns. 561.

misbehavior or any unwarrantable violence, is that the goods were not in truth liable to be seized by the laws of the customs; although by the plaintiff's default they have been condemned in the exchequer. But I take this condemnation to be conclusive evidence to all the world that the goods were liable to be seized, and that, therefore, this action will not lie.

"1. Because of the implicit credit which the law gives to any judgment in a court of record having competent jurisdiction of the subject-matter; the jurisdiction in this case of the Court of Exchequer is not only competent, but sole and exclusive. And though it be said that no notice is given to the owner in person, and that, therefore, he is not bound by the condemnation, not being a party to the suit, yet the seizure itself is notice to the owner, who is presumed to know whatever becomes of his own goods. He knew they were seized by a revenue officer. He knew they were carried to the king's warehouse. He knew, or might have known, that by the course of law the validity of that seizure would come on to be examined in the Court of Exchequer, and could be examined nowhere else. He had notice by the two proclamations, according to the course of that court. He had notice by the writ of appraisement, which must be publicly executed on the spot where the goods were detained. And having neglected this opportunity of putting in his claim, and trying the point of forfeiture, it was his own laches, and he shall be forever concluded by it, not only with respect to the goods themselves, but every other collateral remedy for taking them. For it would be nugatory to debar him from recovering *directly* the identical goods that are condemned, if he is allowed to recover *obliquely* damages equivalent to their value.

"2. Because, the property of the goods being changed, and irrevocably vested in the crown by the judgment of condemnation (as is clear beyond any dispute, and conceded on the part of the plaintiff), it follows, as a necessary consequence, that neither trespass nor trover can be maintained for taking them in an orderly manner. For the condemnation has a retrospect and relation backwards to the time of the seizure. The spirituous liquors that were seized were, therefore, at the time of the seizure, the goods and chattels of his Majesty, and not of the plaintiff, as in his declaration he has necessarily declared them to be,

since neither trespass nor trover will lie for taking of goods, unless at the time of the taking the property was in the plaintiff." The sentence or decree of a court of admiralty and maritime jurisdiction, *in rem*, is binding on all the world, as to matters which were directly in issue therein; and, therefore, where an information was filed in the District Court of the United States against certain goods alleged to have been imported contrary to law, and upon the proceedings thereon, the court adjudged and decreed that the said goods be and remain forfeited to the United States, it was held, in an action by the vendee to recover the purchase money, that the judgment was conclusive evidence that such goods were liable to forfeiture, not only at the time of the decree, but also at the time of their importation.<sup>1</sup>

§ 298. The same principle applies to a decree of any competent tribunal, that property has been forfeited for a breach of a municipal law or local regulation which decrees a sale as the means of carrying the forfeiture into effect,<sup>2</sup> or for a libel filed for repairs or supplies furnished to a vessel, whether the action is in an admiralty or in a state court, under a special enactment.<sup>3</sup> So a judgment ordering the sale of a foreign vessel, by the master of it, which has stranded within the jurisdiction of the court decreeing the sale, is conclusive upon all the world, and estops all persons from questioning the title of the purchaser in any foreign country, where the vessel may be taken after being got off and repaired.<sup>4</sup> It is, therefore, evident that this class of judgments are conclusive, not only upon the parties actually litigating in the cause, but upon third parties who are termed strangers; but the whole world.<sup>5</sup> The reasons, therefore, are, first, that in such cases, where the *res* is the subject matter of the litigation, every one who has any interest or can possibly be affected

<sup>1</sup> Whitney v. Walsh, 1 Cush. 29.

<sup>2</sup> Hoyt v. Gelston, 13 Johns. 141; Bradstreet v. Ins. Co., 3 Sumn. 600; Certain Logs, &c., 2 Sumn. 589; Slocum v. Mayberry, 2 Wheat. 1; Gelston v. Hoyt, 3 Wheat. 246; Megee v. Beirne, 39 Pa. St. 50; Hudson v. Gustier, 4 Cranch, 295; Williams v. Armroyd, 7 Cranch, 234.

<sup>3</sup> Imrie v. Castrique, 8 C. B. N. S.

405; Robert Fulton, The, 1 Paine, 620; Lumley v. Quarry, 7 Mod. 9; Hart v. McNamara, 4 Price, 154; Street v. Ins. Co., 12 Rich. L. 13; The Globe, 2 Bl. C. C. 427; Thompson v. Steamboat Morton, 2 Ohio S. 26.

<sup>4</sup> Cammel v. Sewell, 3 H. & N. 617.

<sup>5</sup> Stoughton v. Taylor, 2 Paine C. C. 655.

by the judgment, is entitled to appear and assert his own rights by becoming and being made an actual party to the proceedings. Second, on the principle *interest reipublice ut sit finis litium*, it is essential to the peace and tranquillity of the community, that questions of this kind should not be left in doubt: but, that our domestic and social relations should be clearly defined and conclusively settled and at rest, and on this ground such judgments can neither be set aside or impeached collaterally, either by parties or strangers, on any other ground than the want of authority or jurisdiction of the tribunal rendering the judgment or decree. Some instances may be found where this class of judgments partake of the nature of judgments *in personam*, as for example, the Federal courts have jurisdiction of revenue cases. They declare property forfeited for a violation of the revenue laws of the United States, and while the judgment of forfeiture is conclusive upon the whole world, as regards the property forfeited, the judgment of the same court in the same action, for the same violation of the revenue laws convicting the party is not so, because that is a judgment *in personam*. But a proceeding *in rem* can affect only the property attached or described in the bill, and when the proceeding is under some statutory provision, all the forms must be strictly complied with and pursued, or the judgment loses the conclusive effect attached to proceedings *in rem*.<sup>1</sup>

§ 299. Another class of proceedings *in rem* are actions brought for the recovery of title to real estate, but they are commenced by personal service or notice by publication, as in actions *in personam*. The force of the judgment in regard to its conclusive effect is limited primarily and exclusively to the matter or land in litigation. The estoppel is limited to those who have been made parties to the action by appearance or service of process. Natural justice, as embodied in the fundamental principle of the law, *res inter alios acta alteri nocere non debet*, will not suffer the title of third persons or strangers to the litigation to be barred by any order or execution based on such a judgment;<sup>2</sup>

<sup>1</sup> *Boswell v. Dickenson*, 4 McLean, 262. *Ragan's Est.*, 7 Watts. 433; *Peters v. Dunnels*, 5 Neb. 460.

<sup>2</sup> *Jackson v. Brown*, 3 Johns. 450;

as, for example, judgments in ejectment are executed by a writ which transfers the title from the defendant to the plaintiff, and as they operate upon the *res* they are judgments *in rem*, but in all other respects they operate as judgments *in personam* as they do not and cannot affect the title of strangers to the action who were in no wise interested or made parties to it,<sup>1</sup> and this principle is not applicable to proceedings which pursue the course of common law, but of those which are founded and regulated by statute.<sup>2</sup>

§ 300. All persons in every part of the world are concluded by the sentence of a prize court in a case clearly coming within its jurisdiction. A prize court having rendered a decree has no power to re-open it after the expiration of the term at which it was rendered.<sup>3</sup> A judgment *in rem* is conclusive, and binds the property, though obtained without notice to the party interested. So a sentence of a United States District Court on the question of forfeiture, under the laws of the United States, is conclusive, and the question cannot be again litigated in a common law court, and an admiralty decree in a proceeding *in rem* for a forfeiture, is conclusive upon all parties claiming an interest in the thing. But a decree in a statutory proceeding is not conclusive, unless the forms be strictly pursued, and a proceeding *in rem* can only affect the property attached as described in the bill.

§ 301. Justice Story, in an elaborate opinion says: "When property is seized, and libeled as forfeited to the government, the sole object of the suit is, to ascertain whether the seizure be rightful and the forfeiture incurred or not? A judgment or decree acts upon the property seized and forfeited, and is conclusive upon the whole world. If the judgment is one of condemnation, it completely changes the title of the property, and the new title thus acquired by, and through the forfeiture, travels

<sup>1</sup> Decosta v. Atkins, Bullers N. P. 87; Hunter v. Butts, 3 Camp. 43; Chirac v. Reinecker, 11 Wheat. 230; Reid v. Stanley, 6 W. & S. 369; Chirac v. Reinecker, 2 Pet. 613; Den v. White, 7 T. R. 112.

<sup>2</sup> Hollingsworth v. Barbour, 4 Pet. 466; Williamson v. Berry, 8 How. 495; Boswell v. Dickinson, 4 McLean, 262; Ege v. Sidle, 3 Pa. St. 124; McKee v. McKee, 38 Pa. St. 231.

<sup>3</sup> Lizzie Weston, Bl. Pr. Cases, 144; The Major Barbour, Ib. 310.

with the thing in all its future progress. If, on the other hand, it is acquitted, the taint of forfeiture is completely removed, and cannot be re-annexed to it. The original owner stands upon his title, discharged of any latent claims with which the supposed forfeiture may have previously infected it. A sentence of a quittal *in rem*, ascertains a fact as much as a sentence of condemnation; it ascertains and fixes the fact that the property is not liable to the asserted claims of forfeiture, and it is therefore conclusive upon all the world of the non-existence of the title of forfeiture, for the same reason that a sentence of condemnation is conclusive of the existence of the title of forfeiture. It would be strange indeed, if, when the forfeiture *ex directo* could not be enforced against the thing, but by an acquittal, was completely purged away, that the forfeiture might be indirectly enforced through the seizing officer; and that he should be at liberty to assert a title for the government, which is judicially abandoned by, or conclusively established against the government itself; because the decree of a court of competent jurisdiction *in rem*, is, as to the points directly in judgment, conclusive upon the whole world,<sup>1</sup> and in this connection it is to be remembered, that whenever a question arises in which the authority of a legal tribunal is to be exercised in regard to a specific thing, the decision is conclusive, not only upon the *Res* itself, but upon the question, and it estops all contradiction in any other litigation with reference to the same property between persons who were not parties to the judgment, and founded on a contract prior to the time when the decision was rendered in reference to the same property, although between persons not parties to the former action, and founded on a contract previous to its rendition. A decree by a court of admiralty condemning a vessel, for a violation of the revenue law of a foreign country, or a breach of a blockade, will not only convey an indefeasible title to those who become purchasers under the decree, but it is conclusive evidence of the cause of condemnation in any action that may arise between the owners of the vessel and the insurers.<sup>2</sup> A decree apportioning

<sup>1</sup> *Gelston v. Hoyt*, 3 Wheat. 246.

600; *Baxter v. Ins. Co.*, 6 Mass. 275;

<sup>2</sup> *Croudson v. Leonard*, 4 Cranch, 434; *Bradstreet v. Ins. Co.*, 3 Sumner,

*Queen v. Hartington*, 4 Ellis & Bl. 788

a loss occasioned by a collision at sea, is not only conclusive, in a subsequent action by the insurers, of the loss and share of each vessel, but of the cause and nature of the collision.<sup>1</sup>

§ 302. "The universal effect of a judgment *in rem* is that it is a solemn declaration of a court of competent jurisdiction upon the status of a thing, which very declaration operates upon the status of the thing adjudicated upon, and renders it *ipso facto*, such as it is thereby declared to be, and is therefore binding upon the whole world. Thus, a condemnation of goods or a prize, not only declares them liable to forfeiture, but accomplishes the forfeiture accordingly. When the status of a thing is thus altered, it follows that the judgment altering it must estop the whole world, for it would be absurd to try the question whether a thing was or was not what it is declared to be, when the judgment has not only declared but rendered it such, and where the title to the property is changed and irrevocably vested in the government by a judgment of condemnation. Neither trover or trespass will lie for taking them in an orderly manner, and this must be the meaning of the doctrine as laid down by Lord Coke," where he states that "where the record of the estoppel runs to the disability of, or legitimation of the person, there all strangers shall take the benefit of that record as *outlawrie*, *excomenement*, *profession*, *attainder of pruemunurri*, &c., *jelonie*, &c., *bastardie*, *muliertie*, and shall conclude the parties, though they be strangers to the record." In all these cases the record operates upon the status of the individual. The judgment of *outlawrie* not merely declares the party an outlaw, but renders him so; and is, therefore, a judgment *in rem*. It, therefore, seems impossible to say that where the *status* of the thing is actually operated upon, that operation shall be of less effect, because some other court, had it been called upon, might have produced a similar one. It may happen that after a court of competent jurisdiction has decreed *in rem*, some other court proceeding *in rem* may pronounce a contrary decree on the same subject matter. But that tribunal assumes a power of appeal, and it is as a judgment

<sup>1</sup> *Magoun v. Ins. Co.*, 1 Story, 157; *Peters v. Ins. Co.*, 3 Sumner, 389.  
*Street v. Ins. Co.*, 12 Rich. L. 13:   <sup>2</sup> 1 Inst. 352 b.

of an appellate court that its decision can be looked on as warrantable.”

§ 303. A judicial sentence *in rem* will be conclusive on all the world, whether a corporation, State, or United States, was plaintiff, or an individual. A judgment is equally conclusive, whichever way it is pronounced, whether it be of forfeiture or acquittal, and, if it be the latter, is as effectual an estoppel as though it was of condemnation, in justifying the conduct of the officers seizing the property on the ground that it had incurred a forfeiture, as a judgment of condemnation would be in estopping the owners from averring that the seizure was illegal, and no forfeiture had occurred.

§ 304. The jurisdiction acquired by a court, by seizure of the *res*, is not to condemn the property without further proceedings. The physical seizure does not of itself establish the allegations of the complaint or libel, and cannot, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end, some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of the notification is immaterial, but the notification

tion itself is indispensable.<sup>1</sup> Therefore, no judgment *in rem* can be binding unless the situation of the property seized, or to be seized, is such as to render it amenable to the authority of the court which renders the decree, or unless the proceedings are conducted in accordance with the well established forms and principles which the jurisprudence of all countries regards as essential to the safety and validity of judicial actions. And it also depends upon the fact whether the court had power to make a decree of that kind, and whether the property was so situated that the exercise of the judicial power would be effectual in rendering it what it declared it to be. In order to render a judgment, sentence, or decree *in rem*, the right arises from an actual or constructive possession of the *Res*, acquired or held in such a way as to make it a fit subject for adjudication, and when this has been once acquired by a duly authorized tribunal, no other is allowed to interfere with the tribunal which first obtains jurisdiction, until the first tribunal has fully adjudicated all matters connected therewith.

§ 305. As a general rule strangers are not bound by nor can they take advantage of an estoppel, and it is not to be presumed that the law intends parties to be bound by proceedings to which they were strangers and had no opportunity of being heard; for instance, where a vessel is sold at a sheriff's sale under a judgment rendered in an action upon an account for goods, wares, and merchandise sold and delivered in the shape of supplies or necessities, will not estop third parties, notwithstanding service was made by publication, and "interested parties notified to show cause," unless by special statutory enactment by the legislature of the state in which the proceedings are had, such actions being made proceedings *in rem*, thus obviating the necessity of having the interested parties in court, as is done by the statute of Missouri.<sup>2</sup> But it has since been decided that state legislatures have

<sup>1</sup> Stoughton v. Taylor, 2 Paine C. C. 653. One who is sued in admiralty for repairs to a vessel is estopped to deny ownership, by the fact, that on a previous sale of the vessel, by the order of another court, he claimed and received the proceeds of such sale as

sole owner. Flanigan v. Turner, 1 Black, 491.

<sup>2</sup> Ritter v. Jamestown, 23 Mo. 348. In Arkansas a judgment *in rem* against a steamboat, unsatisfied, cannot be pleaded as a former recovery in bar of an action against the owners of

no authority to create maritime liens or confer jurisdiction upon state courts to enforce such liens by proceedings *in rem*. Such jurisdiction is vested exclusively in the courts of admiralty of the United States.<sup>1</sup> Where proceedings for the recovery of land are invested with the character of proceedings *in rem*, by the statutes of the state in which the land is located, the judgment is as conclusive as any other decree *in rem*, because it declares the land to belong to the successful party, and the judgment renders it his, and no foreign court can either interfere or review the decree with a view or for the purpose of redressing any injustice that might have been or was committed.

§ 306. Fraud will vitiate any contract or judgment, and may be pleaded either in a judgment *inter partes* or *in rem*, and it makes no difference whether they are foreign or domestic judgments, but it must be understood with this proviso, that fraud, collusion or covin must be proven, and not deduced from mere inference. This may be done when they are urged against strangers to the proceedings, who have had no opportunity to appear and take the necessary step for their protection, and may be plead either collaterally or in a direct proceeding. Estoppels *in rem* are subject to the same limitations which are applicable to those *in personam*, and are limited only to the subject matter in litigation, and will not be extended in any way by intentment or implication.<sup>2</sup>

§ 307. Besides the class of cases referred to in the preceding sections, there is another class which to a great extent may be considered proceedings *in rem*, while in form they are proceedings *between the parties* or *in personam*. Proceedings in attachment are in the nature of, but not strictly a proceeding *in rem*. A proceeding *in rem* is that in which the process is served on the thing itself, and the mere possession of the thing itself by the service of the process, and making proclamation authorizes the court to decide upon it without notice to any individual whatever. In England all the notice the defendant has is by the attachment of his property, while in this country the writ of

the boat on the same contract. Toby 683; The Belfast, 7 Wall. 634.

v. Brown, 11 Ark. 308.

<sup>2</sup> Atty. Genl. v. King, 5 Price,

<sup>1</sup> Deever v. Steamer Hope, A. L. R. 195.

attachment is usually preceded or accompanied by a summons, and service made on the defendant either personally or by publication. If personal service is had on the defendant, or he appears and pleads, and judgment is rendered, it is *in personam*, and has the same effect as if he had been personally served with notice.<sup>1</sup> But an attachment of the property where the court has jurisdiction of the *Res*, but not of the *person* of the defendant, and a sale of it or a levy upon it, if it be real estate, is in the nature of a proceeding *in rem*. The judgment, if the defendant have no notice, is treated as a nullity, outside and beyond the jurisdiction of the court rendering the judgment, so far as the person of the defendant is concerned, though it will be held binding as between the parties so far as regards the property, as a proceeding *in rem*. The defendant cannot recover back the property in another jurisdiction. The status of the property is determined by the proceeding. But the proceeding will not in any way affect the status of the property as to other persons than the parties to the record and those claiming by or under them.

§ 308. "Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant, and subject his property lying within the territorial jurisdiction of the court to the payment of that demand. But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within the territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not. If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes in its essential nature

<sup>1</sup> Barrow v. Burbridge, 41 Miss. 622.

a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or any other; nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court."

§ 309. "It is the only doctrine consistent with proper protection to citizens of other States. If without personal service judgments *in personam* obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished."

"Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent, and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings

authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants,—that is, where the suit is merely *in personam*,—constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State and process published within it are equally unavailing in proceedings to establish his personal liability.”

§ 310. “The want of authority of the tribunals of a State to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied, but the position is assumed that where they have property within the State it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement that the jurisdiction of the court to inquire into and determine his obligations at all, is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always

remain void; it cannot occupy the doubtful position of being valid, if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the State at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If, before the levy, the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."<sup>1</sup> And the same rule applies in all cases where judgments are rendered without personal service or notice. Where property is seized under an order of attachment and no question of ownership is raised, nor any fraud or collusion charged, final judgment in the action concludes all inquiry by third persons concerning the validity or regularity of the proceedings, no matter how erroneous they may have been, provided the court had jurisdiction, and subsequent attaching creditors cannot object that objections were waived.<sup>2</sup> In many States there is no provision

<sup>1</sup> *Pennoyer v. Neff*, 95 U. S. 714; *Boswell v. Otis*, 9 How. 348; *Lovejoy v. Albee*, 33 Me. 414; *Picquet v. Swan*, 5 Mason, 43; *Cooper v. Reynolds*, 10 Wall. 308; *Galpin v. Page*, 16 Wall. 350; *Oakley v. Aspinwall*, 4 N. Y. 520; *Easterly v. Goodwin*, 35 Conn. 276; *Bank v. Brown*, 50 Me. 215; *Swett v. Brackley*, 53 Me. 377; *Ewer v. Coffin*, 1 Cush. 23; *Bank v. Butman*, 29 Me. 19; *Cassity v. Cota*, 54 Me. 380; *Mayfield v. Bennett*, 48 Iowa, 194; *Baduc v. Nicholson*, 4 La. Ann. 81; *Thomas v. Southard*, 2 Dana, 475; *Bunn v. Fletcher*, 23 U. C. Q. B. 36; *Bartlett v. Spicer*, 75 N. Y. 528; *Mickey v. Stratton*, 5 Sawyer. 475; *Smith v. Curtis*, 38 Mich. 393; *Bank v. Peabody*, 55 Vt. 492; *St. Clair v. Cox*, 106 U. S. 350; *Pano v. Bowler*, 107 U. S. 529; *Brooklyn v. Ins Co.*,

99 U. S. 362; *Empire v. Darlington*, 101 U. S. 87; *Pope v. Manf'g Co.*, 87 N. Y. 137; *Darcy v. Ketchum*, 11 How. 165; *Thurber v. Blackburne*, 1 N. H. 242; *Ruggles v. Coleman*, *Hardin*, 413; *Whittier v. Wendell*, 7 N. H. 257; *Simon v. Frank*, 25 Ill. 125; *Jones v. Warner*, 81 Ill. 348; *Kilburn v. Woodworth*, 5 Johns. 41; *Robinson v. Ward*, 8 Johns. 86; *Bates v. Delevan*, 5 Paige, 299; *Starbuck v. Murray*, 5 Wend 148; *Pelton v. Platner*, 13 Ohio, 209; *Arndt v. Arndt*, 15 Ohio, 33; *Rogers v. Burris*, 27 Pa. St. 525; *Winston v. Taylor*, 28 Mo. 83; *Outhwith v. Porter*, 13 Mich. 533; *Keutchler v. Jamison*, 6 Mo. App. 135; *Bissell v. Briggs*, 9 Mass. 462; *Downes v. Shaw*, 22 N. H. 277.

<sup>2</sup> *Randolph v. McDonald*, 6 Neb. 163.

for bringing suits by attachment prior to the maturity of the debt, and where this practice is in force, it is held that the debtor is not estopped, by knowledge of the suit or failing to enter his appearance. That he has his election to do either—appear or bring his action afterwards.”

§ 311. These general principles are applicable to attachments on debts due from third parties to the principal debtor. But, in order that such debts may be secured and the parties released from their liability to their creditors, by a proceeding *in rem* against the debt, the court must have jurisdiction over the garnishee or party owing the debt to the defendant.<sup>2</sup> The proceedings must be regular, and there must be no such fraud as will vacate the proceedings.<sup>3</sup> A judgment *in rem*, while it binds the property, and upon sale vests an absolute title in the purchaser, does not, if the defendant fails to appear and defend the proceeding, have any extra-territorial effect, so as to give any basis for a personal action against the defendant in a foreign sovereignty. But where a party replevies his property, and he and the sureties are garnished in another jurisdiction by a creditor of the attaching creditor or plaintiff, and after judgment against them and the attaching creditor, such judgment is satisfied, the judgment and satisfaction is a complete defense to the creditor's suit on the replevin bond, although rendered in another State.<sup>4</sup>

§ 312. The distinction between proceedings by attachment and by garnishment, is that the latter is a peculiar process by which the effects of the defendant which cannot be seized and taken into custody as in attachment, may still be rendered liable to the payment of his debts. Garnishment is more in the nature

<sup>1</sup> Schenck v. Griffin, 38 N. J. L. 462.

<sup>2</sup> Boston v. Boston, 51 Me. 585; Fitch v. Bugbee, 48 Me. 9; Holmes v. Remsen, 20 Johns. 229; Warden v. Nourse, 36 Vt. 756; McDaniel v. Hughes, 3 East, 367; Dunlap v. Rogers, 47 N. H. 281; Kidder v. Tufts, 48 N. H. 125; Johnson v. Parker, 4 Bush, 129.

<sup>3</sup> Rose v. Himely, 4 Cranch, 269; Sawyer v. Ins. Co., 12 Mass. 291; Bradstreet v. Ins. Co., 3 Sumner, 600; Munroe v. Douglas, 4 Sand. Ch. 180; Magoun v. Ins. Co., 1 Story, 157; Guilandier v. Howell, 35 N. Y. 657; Caskie v. Webster, 2 Wall. Jr. 131; Speed v. May, 17 Pa. St. 91; Clark v. Peat Co., 35 Conn. 303, Castrique v. Imrie, L. R. 4 H. L. 414.

<sup>4</sup> Savin v. Bond, 57 Md. 228.

of proceedings *in rem* than attachment, since its aim is to invest the plaintiff with the right and power to appropriate, to the satisfaction of his claim against the defendant, property of the defendant in the garnishee's hands, or a debt due from the garnishee to the defendant. It is virtually a suit by the defendant, in the name of the plaintiff against the garnishee, without reference to the defendant's concurrence and against his will.<sup>1</sup> The distinction between these proceedings and proceedings *in rem*, is that the latter are directed against the things themselves and only operate incidentally upon the rights of parties; while attachments and garnishments use the hold they have obtained by the seizure of specific property as the means of reaching and giving effect to the rights of parties, and exercise no controlling authority over the rights of strangers, so that attachment and garnishment, strictly speaking, are not proceedings *in rem*.

§ 313. Where one is by garnishment involuntarily made a party to a suit in which he has no personal interest, he is fully protected by the proceedings in law, provided he acts in obedience to the orders of the court, in the surrender and payment of the property attached. As a garnishee is a mere stakeholder for the parties to the suit, he is in a position in which he cannot act voluntarily without danger to his own interest. No voluntary payment after garnishment by the garnishee of his debt to the defendant, and with a knowledge on his part of its existence, will estop his liability as a garnishee, but if it is paid before garnishment it is as complete a defense as it would be in an action against him by the defendant for the same debt. In order, then, to have the protection and benefit of the estoppel, he can only surrender the property or pay the debt in obedience to the order of the court which issues the execution, and thus will protect him not only as against the defendant, but against all parties claiming under him by virtue of a grant or assignment subsequent to the issuing of the garnishment or attachment. Nor can a garnishee interfere or inquire into the proceedings when the jurisdiction of the court extends over the defendant and garnishee; all that he is interested in is that the proceedings shall protect him in any subsequent action against him for the same debt, and

<sup>1</sup> Drake on Attachment, § 452.

against a second payment; neither can he avoid or reverse a judgment for irregularities, or claim the property as exempt for the debtor, he is bound by the judgment.<sup>1</sup> The operation of a judgment against a garnishee is compulsory. He has no choice but to pay in obedience to the judgment of the court to whose jurisdiction he has been subjected; the exercise of that jurisdiction effects a confiscation of the debt due by the garnishee to the defendant, for the plaintiff's benefit.<sup>2</sup>

§ 314. A judgment rendered against a garnishee by a court having jurisdiction of both the action and the person of the garnishee, and if he has satisfied it in due course of law, is conclusive against parties and privies, of all matters of right and title, decided by the court, and constitutes a complete defense to any subsequent action by the defendant against the garnishee for the amount he was compelled to pay,<sup>3</sup> and this, though the court be a foreign tribunal.<sup>4</sup> But the judgment does not affect any one not a party or privy to it. A judgment in favor of a garnishee is just as conclusive against the plaintiff, although it was obtained by fraud and perjury committed by the garnishee. But a judgment in favor of a garnishee will not estop his being charged in another suit by a different party, on account of the same debt, for the obvious reason that judgments bind only parties and privies, not strangers. Thus, where the respondent in a criminal case deposited with his lawyer some money belonging to his employer to secure bail. The lawyer turned the money over to the bondsman, and the latter, being afterward garnished by creditors of the respondent, paid out the money to satisfy their claims, though he had known, when garnished, that it was the money of the employer. *Held*, that he should have so disclosed, and that in a suit against him by the employer, as for money had to plaintiff's use, he could not set up the application of the money in payment of the claims of the creditors.<sup>5</sup> Nor is a judgment

<sup>1</sup> *Earl v. Mathency*, 60 Ind. 202; *Wood v. Partridge*, 1 Mass. 488; *Haskell v. Summer*, 1 Pick. 459. *Schrauth v. Bank*, 8 Daly, 106.

<sup>2</sup> *Drake on Attachment*, § 706. <sup>4</sup> *Barlow v. West*, 23 Pick. 270;

<sup>3</sup> *Wigwall v. Union, &c. Co.*, 37 Iowa, 129; *Webster v. Lowell*, 2 Allen, 123; *Taylor v. Phelps*, 1 H. & G. 492. <sup>5</sup> *Kimball v. Macomber*, 50 Mich. Perkins v. Parker, 1 Mass. 117; 362.

against a garnishee *res adjudicata*, between him and the defendant so as to estop the defendant from claiming more in his action than the garnishee was considered in the attachment proceedings to owe; if it was, it would enable a garnishee to practice a fraud upon his creditors by confessing in his answer a smaller indebtedness than actually existed.<sup>1</sup>

§ 315. Where a part or the whole of a debt of the garnishee to the defendant has been paid under the judgment against him, such payment is as effectual an estoppel either *pro tanto* or completely to a subsequent action by the defendant, as if the payment had been made by the defendant himself.<sup>2</sup> In an action against a garnishee, by his creditor, the attachment defendant, where there was no allegation in the agreed statement of facts, that the amount of the judgment against the garnishee was equal to his debt to the defendant, it was presumed it was so.<sup>3</sup> A payment of a debt by one of several joint debtors under garnishment, is a good defense by way of estoppel in a subsequent suit brought against them by the defendant in the attachment suit.<sup>4</sup> But a judgment rendered on the attachment for a debt or fund, or specific assets of any other description will not estop third parties from asserting a paramount or adverse right to the property attached, or growing out of its negotiation, when it is negotiable security. An attachment will not be a protection against an equitable assignee who claims under the defendant, and not paramount to him, if the garnishee knew of the assignment and failed to plead or give it in evidence against the attaching creditor, unless the assignee was duly notified and opportunity given to come in and defend in person. Nor can a sheriff rely upon an attachment against A. for seizing the goods of B., even when the proceedings result in a judgment in favor of the attaching creditor, and where he is ordered to sell the goods on account of their perishable nature, while it may be a sufficient justification for the sale; it will not relate back or justify the original seizure; for the obvious reason that a judgment against the defendant or

<sup>1</sup> Baxter v. Vincent, 6 Vt. 614; Tams v. Bullitt, 35 Pa. St. 508; Brown v. Dudley, 33 N. H. 511; Robeson v. Carpenter, 7 Mart. (La.) 30.

<sup>2</sup> Canaday v. Detrick, 63 Ind. 485.

<sup>3</sup> McAlister v. Brooks, 22 Maine, 80.

<sup>4</sup> Cook v. Field, 3 Ala. 53.

garnishee can affect only the property of the defendant, not strangers, and does not authorize the seizure of property belonging to third persons, for the defendant's debt.

§ 316. In regard to negotiable notes they cannot properly be made the subject of attachment, as will be seen by the following principles of law laid down by Drake in his admirable work on Attachments. 1st. It is impossible to charge a garnishee as a debtor of the defendant, unless it *appear affirmatively* that, at the time of the garnishment, the defendant had a cause of action against him, for the recovery of a legal debt due, or to become due by the efflux of time. 2d. The attachment plaintiff can hold the garnishee only so far as the defendant might hold him by an action at law. 3d. The garnishee is under no circumstances to be placed by the garnishment in a worse condition than he would otherwise be. 4th. No judgment should be rendered against him as garnishee, where he answers fairly and fully, unless it would be available as a defense against any action afterwards brought against him on the debt, in respect of which he is charged. Applying these well established principles to this subject, it seems that a negotiable instrument can not properly be made the subject of an attachment while still running and before it has reached maturity. It bears the character of negotiable paper until it is due, and no operation which can be given to the garnishment of the maker, can change its nature in this respect. As long as it is negotiable, it is difficult for the maker to say who the possessor or holder may be when it reaches maturity. If the maker is garnisheed in an action against the payee, and answers that he does not know whether he is indebted or not, or may be indebted to the payee, there is no doubt that the answer is insufficient to charge him, without the risk of making him liable twice over for the same debt.<sup>1</sup> For the reason that his obligation is not to pay to any particular person, but to the holder at maturity, whoever he may be, and as neither the garnishee, the defendant, or the court, can say that the defendant will be the holder of the note at its maturity, a judgment against the garnishee assumes he will be, and necessarily renders him liable to pay the same

<sup>1</sup> Stone v. Elliott, 11 Ohio S. 252, v. Jenkins, 53 Md. 217; Knisely v. Kieffer v. Ehler, 18 Pa. St. 388; Cruett Evans, 34 Ohio St. 158

debt twice. For this reason, no judgment can be rendered without placing the garnishee in a worse situation than he would otherwise be in by requiring him to pay to the plaintiff what he may, from the character of the paper, in all probability be compelled to pay again to the innocent holder of the note. For although privies are bound by the result of a judicial proceeding between the parties under whom they claim, and the assignee of an overdue note or chose in action is in privity with the assignor, and can assert no right which has been barred by judgment against him.

§ 317. The indorsement of a note before it is due, for value, and without notice, does not fall within the same principle as the assignment of an overdue note. If a note which passes from hand to hand as cash, on which the holder may institute suit in his own name, has all the properties of a bank note payable to bearer, which would be embraced by a bequest of money, and which may be actually in circulation in another State or country, should be adjudged to be liable to attachment before maturity, it would not only overthrow an essential part of the commercial system, but annihilate the negotiable qualities of all such instruments,<sup>1</sup> and unless it is affirmatively shown that, before the rendition of the judgment, the note had become due, and was then still the property of the payee. The maker of the note cannot be charged as garnishee of the payee without violating sound and well established principles of commercial law, justice and equity. *Bona fides non patitur bis idem exigatur.* Unless it is done as in one case<sup>2</sup> by impounding the note and holding it until it was due. The doctrine of *lis pendens* is not applicable to a proceeding like attachment, which does not specifically limit the property involved, and constructive notice cannot supply the place of actual, in the case of negotiable paper which passes freely from hand to hand.

§ 318. Payment by compulsion of law is a good defense against the creditor when it is legal, rightful, and strictly within the order of the court;<sup>3</sup> but a judgment or decree assuming to

<sup>1</sup> Ludlow v. Bingham, 4 Dallas, 47;  
Knisely v. Evans, 34 Ohio St. 158;  
Cruett v. Jenkins, 53 Md. 217.

<sup>2</sup> Kieffer v. Ehler, 18 Pa. St. 388.

<sup>3</sup> Holmes v. Remsen, 20 Johns. 229;  
Wood v. Partridge, 11 Mass. 488;

reach beyond the parties, and estop persons who have not been summoned or had an opportunity to be heard in their own defense, is not only contrary to right and justice, but is absolutely void for want of jurisdiction.<sup>1</sup>

§ 319. In a suit by the attachment defendant against a garnishee, a payment under a judgment against the garnishee will be effectual as a defense by estoppel if properly pleaded. In order to render it effectual, the garnishee must prove the judgment under which he made the payment; that it was a valid judgment, for a payment under a void judgment, no matter how apparently regular the proceedings may have been, cannot protect him against the defendant or his representatives. That the payment was not voluntary. That it was an actual payment, not pretended or contrived. That the court which rendered the judgment had jurisdiction of the subject matter and the parties. If there be a defect in this respect, the payment is regarded as voluntary. But if it had jurisdiction, no matter how irregular the proceeding may have been, it is good as an estoppel; even a reversal on error after payment by the garnishee will not invalidate the payment; if he contest the jurisdiction of the court, and his objection is overruled and judgment is rendered against him it will be conclusive in his favor. If the law requires of the plaintiff as a condition precedent to obtaining execution, a particular act, such as filing a bond, and without its performance the garnishee makes payment under it, the payment will be no protection, as it is regarded as voluntary. In order to entitle one to plead an attachment as a conclusive defense, there must be no neglect, collusion, or misrepresentation on his part in the progress of the attachment suit; if there is, then there is no estoppel against the creditor.

§ 320. A garnishee is not obliged to watch the regularity of proceedings in the suit in which he is garnisheed, nor can he be held in any way responsible for them. The answer of the garnishee being the basis of the judgment, his liability being therein set forth, the record will sufficiently establish his defense when

Winston v. Westfeldt, 22 Ala. 760;     <sup>1</sup> Kiefer v. Ehler, 18 Pa. St. 388.  
Kiefer v. Ehler, 18 Pa. St. 388.

sued by the attachment defendant, unless he allows judgment to go by default, then it must be proved by parol evidence. In assumpsit the judgment and execution in attachment may be pleaded specially or given in evidence under the general issue, but in debt on bond it must be pleaded specially, if not pleaded properly, or the defendant fails for want of a proper plea: the garnishee will have no remedy either in law or equity but to pay the debt over again. A payment by a garnishee in obedience to the order of the court in which he has been attached will be effectual as an estoppel in any subsequent suit against him for the same debt, whether the proceedings took place in a domestic or foreign tribunal, and whether they were or were not conclusive as regards the other parties to the action, because a payment made in good faith and by compulsion of law, exonerates the person who makes it, from further responsibility and remits those entitled to the fund to an action against whom it is received. So a creditor who takes part in defending an attachment on the ground that the debt attached was due to him, is estopped from denying the validity of the attachment subsequently, as against the plaintiff and garnishee.<sup>1</sup> But proceedings commenced by attachment can not be binding unless the thing attached is within the State or district over which the authority of the court extends, or jurisdiction is required by personal service upon the garnishee, and a party can, under any and all circumstances, show that the thing attached was not subject to attachment.<sup>2</sup>

§ 321. The proceedings in foreign attachment partake still more of the nature of a proceeding *in rem*; its operation is, however, limited in character. The suit is between the parties, and, as a proceeding *in rem*, it must be confined to such parties. A writ is issued in favor of the plaintiff, declaring against his debtor, residing in a foreign government, and alleging, also, that

<sup>1</sup> Peterson v. Lathrop, 34 Pa. St. 223; Richardson v. Watson, 23 Mo. 34; Tarleton v. Johnston, 25 Ala. 300; Coates v. Roberts, 4 Rawle, 104.

<sup>2</sup> The U. S. Supreme Court, Miller's Exrs. v. U. S., 11 Wall. 301, decided that proceedings by garnishment and

attachment against negotiable paper was a valid seizure, and that the return was conclusive as to the seizure, and that it held the property, and that the *res* was then in possession of the U. S. Marshal reversing Pelham v. Rose, in 9 Wallace.

another person, named in the writ and styled a trustee or garnishee, has goods in his hands belonging to the attachment defendant, or is indebted to him, praying that the goods or debt found within the jurisdiction of the court from which the process issues, may be declared forfeited to the plaintiff, or, strictly speaking, that the property be appropriated in satisfaction and payment of the plaintiff's demand. Where the court has jurisdiction, its proceedings are *in rem*, after publication, which constructively notifies the defendant of the proceedings against the property. The court adjudicates upon the property, the thing itself, and orders it sold or delivered to the plaintiff in payment of his debt. The judgment changes the status of the property or debt, it deprives the attachment defendant of all title to it, and is binding and conclusive upon all the parties to the proceeding. The foreign creditor of the trustee or garnishee, having placed his property within the jurisdiction of the court rendering the judgment, is estopped from prosecuting his claim against the garnishee in any other jurisdiction.

§ 322. Foreign attachment is a peculiar proceeding to compel the appearance of a debtor by seizing his property, and in default of appearance appropriating it to the payment of the debt. It is strictly a proceeding *in rem*. With respect to the property attached, whether it be real or personal, or a debt due the defendant from the garnishee, the judgment and proceedings are conclusive. Neither in a subsequent action by the defendant in attachment against the garnishee for the recovery of the debt attached, nor in an action to recover the lands or chattels levied on, can the defendant in attachment defeat the recovery in the attachment suit by disproving the debt for which the attachment issued. If the court had jurisdiction, the judgment is conclusive, and cannot be called in question for mere irregularities, when offered collaterally. Thus far, and for these purposes, a judgment in attachment has the quality of conclusiveness which pertains to an ordinary common law judgment.<sup>1</sup> But except with respect

<sup>1</sup> Voorhees v. Bank of U. S., 10 East, 367; Turbill's Case, 1 Saund. Peters, 49; Cooper v. Reynolds, 10 67, n.1; Welsh v. Blackwell, 14 N. Wall. 309; McDaniel v. Hughes, 8 J. 344; Lomerson v. Hoffman, 24 N. J. L. 674.

to the property attached, the proceeding has no effect. No action can be brought on the judgment recovered, and in an action on the original demand a judgment in attachment is not competent as *prima facie* evidence of the indebtedness.<sup>1</sup>

§ 323. The operation of this proceeding *in rem* is limited to the parties to it, and does not affect the right, title or interest of any other person having an independent or adverse claim to the goods or debt, which was the subject matter of the suit, for the reason that the court does not pretend to notify such adverse claimant, either constructively or otherwise, nor do the proceedings determine the right of any persons except those who are parties of record to it. These limited proceedings *in rem* are not based upon any allegation that the right of property is to be determined between any other person than the parties to the suit, no notice is given to any other persons, the judgment being only as to the status of the property between the parties of record, it is, as to all other persons, a mere nullity. Whenever a court of competent jurisdiction assumes the control or custody of a particular thing, its proceedings are then *in rem*, and are so regarded whenever it is necessary, for the protection of either of the parties to the proceeding or the property itself. A purchaser of property under a sheriff's sale made by order of the court on account of the perishable nature of the property, will obtain a good title against the world, no matter how irregular or defective the attachment proceedings may be.<sup>2</sup> The sale of a ship seized under proceedings in foreign attachment, by a court of common law, under an order that it should be sold as perishable property, and the proceeds paid into court, was held to pass a good title against the world, and divested the title of the seamen for their wages, and remitted them to the fund arising from the sale.<sup>3</sup> The estoppel, in such cases, is founded on the action of the court in its ministerial capacity, and it may be founded on the acts of persons who are destitute of judicial power, whose authority is derived solely from necessity.<sup>4</sup> A sale made by a master of a

<sup>1</sup> Miller v. Dungan, 36 N. J. L. 21; Rubber Co. v. Goodyear, 9 Wall. 807; Schenck v. Griffin, 38 N. J. L. 462.

<sup>2</sup> Woodruff v. Taylor, 20 Vt. 65.

<sup>3</sup> Carryl v. Taylor, 24 Pa. St. 259; S. C., 1 Wallace, Jr. 311; Taylor v Carryl, 20 Howard, 593.

Mankin v. Chancellor, 2 Brock. 125

vessel, in case of necessity, will pass a good title, not only as against those by whom he was himself appointed, but against third persons claiming under an independent right or title. The right to sell under such circumstances carries with it the right to confer a new and indefeasible title on the purchaser, founded on the necessity of the sale.

§ 324. A judgment in an action for trover or trespass, brought by the finder of a chattel against a third person, by whom it has been wrongfully taken or detained, will operate as an estoppel *in rem*, and vest a good title in the defendant against all the world, because the nature of the action compels the plaintiff to act for unknown and absent owners of the property found, and renders it necessary that the defendant should be protected from being made answerable a second time in damages for the same thing. The estoppel in such cases is essentially an estoppel *in pais*, deriving its force from the circumstances which create it; and unless they are such as to give it birth, it will have no existence, no matter how regular or formal the proceedings on which it assumes to be founded, and a decree of a tribunal that an injured vessel shall be sold will pass no title, unless the sale would have been valid if made by the master, in case of necessity, without a decree,<sup>1</sup> for the proceeding is strictly *in rem*, and the court duly authorized to bind the parties without giving them an opportunity to be heard.<sup>2</sup>

§ 325. The same rule applies to proceedings in replevin, where the authority to seize specific property is given, solely with a view to the determination of the right of property between the plaintiff and defendant, the judgment will not estop the subsequent assertion of a distinct and adverse title by a third person.<sup>3</sup> There is no conflict or inconsistency between successive writs of replevin or attachment by different persons for the same property.<sup>4</sup> Replevin may be maintained by one man for the

<sup>1</sup> Reid v. Darby, 10 East, 143; Morris v. Robinson, 3 B. & C. 196.

<sup>2</sup> Cammell v. Sewell, 3 H. & N. 617.

<sup>3</sup> Spencer v. McGowan, 13 Wend. 256; Shipman v. Clark, 4 Denio, 446;

Stimpson v. Reynolds, 14 Barb. 506; Foster v. Pettibone, 20 Barb. 350;

Shaffer v. Marienthal, 17 Ohio S. 183.

<sup>4</sup> Safford v. Peatty, 12 Ohio S. 189.

recovery of chattels that have been seized under an attachment against another, because an authority to take the goods of A. will not be a justification for taking the goods of B. While a judgment in replevin, although limited to the *Res*, is not *in rem*, and will not be conclusive on third persons; the writ can be pleaded as a justification by the officer against all the world.

§ 326. Besides the actions mentioned, there are still another class which partake of the nature of proceedings *in rem*, and the determination of the tribunals having jurisdiction may be *in rem* and *personam*. The proceedings in England of Ecclesiastical Courts, Spiritual Courts, and in America of Probate Courts, Courts of Ordinary, Surrogate Courts, Orphans' Courts, and all other courts, whatever their appellation may be, which have jurisdiction of the sale of a decedent's estate for the payment of his debts, or for the purpose of facilitating or effecting the distribution of a decedent's estate among his heirs. Proceedings of this nature are usually commenced on petition, or notice by publication, and partake, to a great extent, of the same conclusive effect and nature as that accorded to proceedings *in rem*, or rather in Admiralty and Prize Courts. All parties claiming title from or under a decedent are bound by the decree, whether they were made parties or not. In England, the courts having special jurisdiction of matters of probate, marriage, and divorce, are termed Ecclesiastical or Spiritual courts. They decide directly upon the legality of marriages, compel specific performance of a contract of marriage, or for restitution of conjugal rights, being adjudications upon the status of the parties, &c.<sup>1</sup> There are no such courts in this country. But the courts above mentioned are placed on the same basis as the Ecclesiastical and Spiritual courts of England. The action *causa jactitationis matrimonii*, and that for the restitution of conjugal rights, are unknown to our law, and an action to enforce the celebration of a marriage, in accordance with a former contract, is an action that has never been heard of in American courts, the general rule being the converse of this, the action being for a dissolution of the marriage

<sup>1</sup> *Da Costa v. Villa Real*, Str. 961; 42; *Meadowcroft v. Hugenin*, 4 Moo. Phillips v. Bury, 2 T. R. 346; Bunt- P. C. 386; *Perry v. Meadowcroft*, 10 ing's Case, 4 Co. 29; *Keen's Case*, 7 Co. Beav. 122.

contract. In another portion of this work it will be shown that in actions of divorce on any of the various grounds on which a decree is granted, by the various tribunals in the United States, though not by Ecclesiastical courts, they have the same conclusive effect in every State in the Union as is accorded them in the State where they are granted.

§ 327. Proceedings in Surrogates' Courts, Orphans' and Guardians' Courts, County Courts, Courts of Ordinary, Probate Courts, and other courts having a limited jurisdiction,—that of the disposition of the estate of decedents,—their decrees are conclusive evidence in regard to the real as well as the personal estate of the intestate. It is a general rule of law, that, where any matter belongs to the jurisdiction of one court so peculiarly that other courts can only take cognizance of the same subject incidentally and collaterally, the latter are bound by the sentence of the latter, and must give credence to it.<sup>1</sup> A probate is the only legal and legitimate evidence of personal property being vested in an executor, or of his appointment, and is conclusive evidence of this fact, and letters of administration are conclusive of the appointment of the administrator. A grant of *probate* or of *administration*, is in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares belongs to him. Accordingly, such grant of probate or administration is conclusive against all the world.<sup>2</sup>

<sup>1</sup> Williams v. Saunders, 5 Cold. 60; Bouchier v. Taylor, 4 Bro. P. C. 708; Painter v. Henderson, 7 Pa. St. 45; Castro v. Richardson, 18 Cal. 478; Jordan v. Meier, 30 Mo. 40; Naylor v. Moffatt, 29 Mo. 126; Banning v. Banning, 12 Ohio S. 437; Duke v. Duke, 26 Ala. 673; Springer's Appeal, 29 Pa. St. 208; Herbert v. Hannick, 16 Ala. 581; Coffin v. McCullough, 30 Ala. 107; Samuels v. Findley, 17 Ala. 635; Reeves v. Townsend, 2 N. J. Eq. 396; Pierce v. Irish, 31 Me. 254; Tompkins v. Tompkins, 1 Story, 547; McFarland v. Stone, 17 Vt. 165; Wild v. Sweeney, 84 Ill. 213; Litchfield v. Cudworth, 15 Pick. 23; Vanderpool v. Van Valk-

enburgh, 6 N. Y. 190; Bogardus v. Clark, 4 Paige, 623; Fry v. Taylor, 1 Head, 591; Morgan v. Locke, 28 La. Ann. 806; Cecil v. Cecil, 19 Md. 72; Loring v. Steinman, 7 Met. 204; Laurence v. English, 24 Vt. 42; Farnar v. Olmstead, 21 Vt. 123; Stein v. Bennett, 24 Vt. 303; Savage v. Benham, 17 Ala. 119; Tibbets v. Tilton, 21 N. H. 120; McKee v. Whitten, 25 Miss. 31; Rhoades v. Selin, 4 Wash. C. C. 715; McPherson v. Cuniff, 11 S. & R. 429; Hargraves' Law Tracts, 452; Cassels v. Vernon, 5 Mason, 332.

<sup>2</sup> Smith v. Fenner, 1 Gall. 171; Spencer v. Spencer, 1 Gal. 623; Bogardus v. Clarke, 1 Ed. Ch. 266; Dub-

§ 328. The decrees of such courts, when acting within their jurisdiction, like adjudications of prize and forfeiture, and in matters of collision in admiralty, sentences in action of divorce, and in suits for jactitation of marriage, judgments and orders in proceedings in insolvency and bankruptcy, and others, are conclusive upon all persons. They are *in rem* rather than *in personam*, and, as such, cannot be impeached in any suit or proceeding, or by any person. Such courts are limited strictly to the powers conferred by statute, and what is merely irregularity or error in the proceedings of other courts becomes with them, in very many cases, defect of jurisdiction. So long as their adjudication stands unreversed it cannot be impeached or inquired into by any tribunal, not by law created with jurisdiction to review it.<sup>1</sup> A grant of letters of administration, by a court having the sole and exclusive power of granting them, and which, by statute, is obliged to grant them, to the relatives of the deceased who would be entitled to succeed to his personal estate, is conclusive upon other courts, upon the question of legitimacy, and this question cannot be raised on a bill for distribution by the persons who had opposed the grant of letters, against the person to whom they had been granted.<sup>2</sup> The appointment of

- lin v. Chadbourne*, 16 Mass. 433; *Laughton v. Atkins*, 1 Pick. 535; *Crusoe v. Butler*, 86 Miss. 150; *Townsend v. Moore*, 8 Jones, 147; *Clark v. Drew*, 1 R. & M. 103; *Montgomery v. Clark*, 2 Atk. 378; *Allen v. Dundas*, 3 T. R. 125; *Jolliffe*, in re, 8 Beav. 168; *Acher v. Mosse*, 2 Vern. 8; *Nelson v. Oldfield*, 2 Vern. 76; *Pume v. Beale*, 1 P. Wms. 388; *Munroe v. Douglas*, 4 Sand. Ch. 126; *Dennison v. Hyde*, 6 Conn. 508; *Calvert v. Bovill*, 7 T. R. 523; *Christie v. Secretan*, 8 T. R. 192; *Fry v. Taylor*, 1 Head, 594; *Gingell v. Horne*, 9 Sim. 539; *Noel v. Wells*, 1 Lev. 235; *Miller v. Brinkerhoff*, 4 Denio, 119; *Staples v. Fairchild*, 3 N. Y. 41; *People v. Sturtevant*, 9 N. Y. 263; *Skeinnion v. Kelly*, 18 N. Y. 355; *Porter v. Purdy*, 20 N. Y. 106; *Bumstead v. Read*, 31 Barb. 661; *Grignon v. Astor*, 2 How. 819; *Halcumb v. Phelps*, 16 Conn. 127; *State v. Scott*, 1 Bail. L. 294; *Raborg v. Hammond*, 2 H. & G. 42; *Brittain v. Kinnaird*, 1 B. & B. 432.
- <sup>1</sup> *Laurence v. Englesby*, 24 Vt. 42; *Allen v. Dundas*, 3 T. R. 125; *Judson v. Lake*, 3 Conn. 318; *Kane v. Canal Co.*, 15 Wis. 179; *Nash v. Church*, 10 Wis. 303; *Archer v. Meadows*, 33 Wis. 172; *Steen v. Bennett*, 31 Vt. 303; *Farrar v. Olmstead*, 24 Vt. 123; *Hampton v. Hardin*, 88 N. C. 592; *Barwick v. Wood*, 3 Jones L. 306; *Granberry v. Moon*, 1 Dev. 456; *Nav. Co. v. Green*, 3 Dev. 434; *London v. R. R. Co.*, 88 N. C. 584; *Lebrew's Succession*, 31 La. Ann. 212; *Freeman v. Rahm*, 58 Cal. 111; *Garwood v. Garwood*, 29 Cal. 514.
- <sup>2</sup> *Caujolle v. Ferrie*, 13 Wall. 465;

an administrator or guardian being a proceeding *in rem* and conclusive upon the whole world, one of the necessary attributes of this principle is, that innocent parties must be protected in their transactions with the legal representative of the estate. The administrator may transfer, release, compound, or discharge debts, as fully as if he was the absolute owner, subject only to his liability to answer to creditors and distributees, for improvidence in the exercise of his power. No *bona fide* dealing with him can be impeached—no remedy can be pursued against those to whom he may transfer, or to whom he may release, or with whom he may compound, or from whom he accepts satisfaction, of the choses in action, unless fraud and collusion can be imputed to him.<sup>1</sup>

§ 329. In regard to the decrees and sentences of courts exercising any branches of Ecclesiastical jurisdiction, they are governed by the same general principles already stated. The principal branch of this jurisdiction, existing in the United States, is that relating to matters of *probate and administration*. In this, as in other cases, the limitation is, as to whether the matter was exclusively within the jurisdiction of the court, and whether a decree or judgment has been passed directly upon it. If jurisdiction has attached, the decree is conclusive. Where the decree is of the nature of proceedings *in rem*, as is generally the case in matters of probate and administration, it is conclusive, like those proceedings, against all the world. But where it is a matter of exclusively private litigation, such as in assignment of dower, and some other cases of jurisdiction conferred by particular statutes, the decree is subject to the same rules as judgments in other actions. Thus, the probate of a will, at least, as to the personality, is conclusive in civil causes, in all questions upon its execution and validity.<sup>2</sup> The grant of letters of administration

Lebrew's Succession, 31 La. Ann. 212.

<sup>1</sup> Hill v. Simpson, 7 Vesey, 164; Taylor v. Hawkins, 8 Vesey, 212; McLeod v. Drummond, 14 Vesey, 353; S. C., 17 Vesey, 153; Smith v. Fenner, 1 Gall. 71; Spencer v. Spencer, 1 Gall. 623; Sims v. Slocum, 3 Cranch, 300;

McDonald v. Napier, 14 Ga. 89; Waring v. Lewis, 53 Ala. 615; Woolfolk v. Sullivan, 23 Ala. 548; Moses v. Clark, 46 Ala. 129; Rodenas v. Bank, 63 N. Y. 460.

<sup>2</sup> Layton v. Atkins, 1 Pick. 535, Heyer v. Burger, 1 Hoff. Ch. 10; Colton v. Ross, 2 Paige, 396; Muir v.

is, in general, conclusive evidence of the intestate's death; for only upon evidence of death, are they granted.<sup>1</sup> A probate court has no jurisdiction to administer on the estate of a living person: all such proceedings are void for all purposes.<sup>2</sup> But the grant of administration upon a woman's estate determines nothing as to the fact whether she were a *feme covert* or not; for that is a collateral fact, to be collected merely by inference from the decree or grant of administration, and was not the point directly tried.<sup>3</sup> Where a court of Probate has power to grant letters of guardianship of a lunatic, the grant is conclusive of his insanity at that time, and of his liability therefore, to be put under guardianship against all persons subsequently dealing directly with the lunatic, instead of dealing, as they ought to do, with the guardian.<sup>4</sup> But it is not conclusive against his subsequent capacity to make a will.<sup>5</sup>

Trustees, &c., 3 Barb. Ch. 477; Bogardus v. Clarke, 4 Paige, 623; Middleton v. Sherburne, 4 Y. & C. 358; Patten v. Tallman, 27 Me 17; Osgood v. Breed, 12 Mass. 525; Fallon v. Chidester, 46 Iowa, 588; S. C., 36 Am. R. 164; Rex v. Rains, 12 Mod. 136; Green v. Waller, 2 Ld. Raym. 893; Hume v. Burton, 1 Ridg. 277; Kempton v. Cross, Cas. T. Hard. 108; Mendez v. Villa Real, Cas. T. Hard. 18; Clues v. Bathurst 2 Stra. 900; Collins v. Ross, 2 Paige, 306; Paplin v. Hawks, 8 N. H. 124; Langdon v. Goddard, 3 Story, 13; Vanderpool v. Van Allen, 6 N. Y. 100.

<sup>1</sup> Newman v. Jenkins, 10 Pick. 515; Moore v. De Bernalis, 1 Russ. 301. The general practice was stated and not denied to be, to admit the letters of administration, as sufficient proof of the death until impeached, but the Master of the Rolls in that case, which was a foreign grant of administration, refused to receive them, but allowed the party to examine witnesses to the fact.

<sup>2</sup> Duncan v. Stewart, 25 Ala. 408; Morgan v. Dodge, 44 N. H. 259; Fisk v. Norvell, 9 Tex. 13; Wales v. Willard, 2 Mass. 129; Smith v. Rice, 11 Mass. 507; Griffith v. Frazier, 8 Cranch, 9; Jochumsen v. Bank, 3 Allen, 87; Melia v. Simmons, 45 Wis. 334; S. C., 30 Am. R. 746; D'Arusment v. Jones, 4 Lea, 251; S. C., 40 Am. R. 12; Stevenson v. Sup. Ct., 62 Cal. 60; Binson v. Ivey, 1 Yerr. 306; Johnson v. Beasley, 65 Mo. 250, S. C., 27 Am. R. 285; Allen v. Dundas, 3 T. R. 125; Roderigas v. Bank, 76 N. Y. 316; Thomas v. People, 107 Ill. 516; S. C., 49 Am. R. 458; Devlin v. Commonwealth, 101 Pa. St. 273; S. C., 47 Am. R. 710.

<sup>3</sup> Blackham's Case, 1 Salk. 290; Hibshman v. Dullehan, 4 Watts, 183; Rex v. Inhabitants, 7 A. & E. 782.

<sup>4</sup> Searle v. Galbraith, 73 Ill. 269; Thompson v. Kercheval, 10 Humph. 322; Farrar v. Olmstead, 24 Vt. 123; Dutcher v. Hill, 29 Mo. 271; Leonard v. Leonard, 14 Pick. 280.

<sup>5</sup> Stone v. Damon, 12 Mass. 488.

§ 330. Whenever these courts transcend the limits of their powers their acts will be held void ; or if they fail to take the necessary steps for obtaining jurisdiction over the cause or the parties.<sup>1</sup> But when jurisdiction of these courts has once attached, and is not exceeded, it will not be lost by any irregularity in the mode of exercising it, and every intendment will be made in aid of the regularity of the proceedings, which will be regarded as equally conclusive with those courts of superior and general jurisdiction.<sup>2</sup> When the validity of a grant of letters of administration is questioned collaterally the only point open to examination is whether the court had jurisdiction ; if that fact is affirmatively established the grant is conclusive. In proceedings to sell real estate for the payment of debts such courts generally have jurisdiction to ascertain and adjust the liens thereon, settle priorities among lienholders, and apply the proceeds of sale in satisfaction thereof, in the same manner and to the same extent as a court of equity might in like proceedings. The findings and judgments in such proceedings are conclusive against the parties thereto, and it is immaterial as to their effect whether such parties shall appear and answer to the issues and claims, made or not, or whether such claims or issues be presented in the petition, or in the other pleadings in the cause.<sup>3</sup>

Where the sale was on the application of a creditor, the Supreme Court of the United States said : “ The application of the judgment-creditor and the answer of the administrator gave the judge jurisdiction over the parties and the real estate of the deceased. Jurisdiction is the power to hear and determine. To make the order of sale required the exercise of this power. It was the business and duty of the court to ascertain and decide whether the facts were such as called for that action. The question always arises in such proceedings—and must be determined—whether, upon the case as presented, affirmative or negative

<sup>1</sup> *Jenks v. Howlan*, 3 Gray, 536; *v. Sinclair*, 3 Bush, 261; *Habert v. Gwin v. McCarroll*, 9 Miss. 351; *Enos Hannick*, 16 Ala. 581; *Harris v. Ferriss*, 16 Fla. 84; *Meredeth v. Ass.*, 60 4 Ind. 355; *Peters v. Peters*, 8 Cush. Cal. 621; *Roe v. San Francisco*, 60 Cal. 93; *Parker v. Altschul*, 60 Cal. 529. 383.

<sup>2</sup> *Haynes v. Meek*, 10 Cal. 110; *Brown v. Redwine*, 16 Ga. 67; *Boyce* <sup>3</sup> *Bank v. Green*, 4 Fed. Rep. 609

action is proper. The power to review and reverse the decision so made is clearly appellate in its character, and can be exercised only by an appellate tribunal in a proceeding had directly for that purpose. It cannot and ought not to be done by another court, in another case, where the subject is presented incidentally, and a reversal sought in such collateral proceeding. The settled rule of law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular in all things and irreversible for error. In the absence of fraud, no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischiefs would ensue if the rule were otherwise.”

§ 331. A decree for the sale of a decedent's real estate for the payment of his debts by a court of competent jurisdiction, non-resident heirs having been made parties by publication, cannot be impeached collaterally, and where it is sold on a certain day pursuant to a decree of a competent court, it cannot be objected to, that the sale took place before the time prescribed by law. When courts having jurisdiction for the sale of an intestate's real estate for the payment of his debts make an order for such sale, no other court can re-examine the order while it remains in force except an appellate court<sup>2</sup> on proceedings regularly brought in error.<sup>3</sup> A decree made upon a deceased guardian's account, the subsequent guardian being made a party to the proceedings, is conclusive, and a complete bar to a bill in equity in any other court.<sup>4</sup> So a decree of a probate court granting to a husband administration with the will annexed on his wife's estate is conclusive of her right to make the will,<sup>5</sup> and an order for the sale

<sup>1</sup> *Connett v. Williams*, 20 Wall. 226; *McNitt v. Turner*, 16 Wall. 366; *Lowe v. Gruice*, 69 Ala. 80; *Lesseps v. Lapene*, 34 La. Ann. 112; *Finley v. Robinson*, 17 S. C. 435.

<sup>2</sup> *Griffith v. Bogert*, 18 How. 158; *Holmes v. Dabbs*, 15 La. Ann. 501.

<sup>3</sup> *Allen v. Lyons*, 2 W. C. C. R. 475; *Frisby v. Harrison*, 30 Miss. 452; *Lesseps v. Lapene*, 34 La. Ann. 112; *Finley v. Robertson*, 17 S. C. 435.

<sup>4</sup> *Blount v. Da Rach*, 4 W. C. C. 657; *Porche v. Ledoux*, 13 La. Ann. 350.

<sup>5</sup> *Cassels v. Vernon*, 5 Mason, 332.

of a decedent's real estate, granted by a probate court, if jurisdiction is shown on the face of the proceedings, is conclusive as to the necessity and propriety of the sale.<sup>1</sup> A decree settling an account is conclusive and cannot be impeached in an action on a probate bond nor by a bill in equity to compel an account.<sup>2</sup> In New York they are expressly made so by statute but are impeachable in equity for fraud. In Pennsylvania the conclusive character of decrees settling an account are placed as far above impeachment as the adjudications of any other court. Notwithstanding the conclusiveness of this class of adjudications, one fact must be remembered, that evidence may be adduced to show want of jurisdiction;<sup>3</sup> as, for instance, that the deceased died in a foreign State, the surrogate not having the power so that the letters were of administration *durante absentia* of an executor, or that the grant was revoked, for that is the further act of the same court; or that it was forged, for that shows it not to be the act of the court at all; or that it was granted by a court having no jurisdiction, for then it is a nonentity. But it cannot be shown that the testator was mad or that the will was forged, for these facts might have been alleged in the probate, surrogate or orphans' courts in opposition to the grant of probate or administration<sup>4</sup> of an executor, or that they are of the estate of a living person, or if there be no jurisdiction of the party for want of notice, if that is required, or where the party is not regularly in court, as is required by law, or where the land sold lay in a foreign State, or if an attorney or guardian of an infant be necessary and there be none appointed, the sale of land is void as to him, or if there was no petition to sell, or where they go beyond the statute power of the court, as where the land held in dower was on the death of the tenant distributed to one in preference to another of the next of kin or heirs.<sup>5</sup>

<sup>1</sup> Iddings v. Cairns, 2 Grant's Cas. 88; Comstock v. Crawford, 3 Wall. 396.

<sup>2</sup> McDougal v. Rutherford, 30 Ala. 253; Saxton v. Chamberlain, 6 Pick. 422; Field v. Hitchcock, 14 Pick. 405; Stott's Estate, in re, 52 Cal. 403; Leavitt v. Malone, 54 Ala. 19.

<sup>3</sup> Elliott v. Pearsall, 1 Pet. 328; Jen-

nison v. Hapgood, 7 Pick. 1; Groff v. Groff, 14 S. & R. 181; Downing's Estate, 5 Watts, 90; Goodrich v. Thompson, 4 Conn. 215; The Aurora, 1 Wheat. 96.

<sup>4</sup> Noel v. Wells, 1 Levinz, 235; Moore v. Tanner, 5 Mon. 42; Vanderpool v. Van Valkenburgh, 6 N. Y. 190.

<sup>5</sup> Bates v. Delevan, 5 Paige, 299;

§ 332. The United States government is not ordinarily bound by an estoppel<sup>1</sup> in a case where an administratrix had distributed her estate and made her final settlement under a decree of a probate court, it protected her from a claim by the United States government,<sup>2</sup> against the estate some years after the settlement.

§ 333. The payment of money to an executor who had obtained probate of a forged will which was afterwards repealed, is a discharge to the party paying it.<sup>3</sup> Since the probate being conclusive evidence of the executorship as long as it remains unrepealed, the debtor would, when he was called upon to pay, have had no defense against the action brought by the executor under the forged will, and on this same principle an innocent purchaser from a devisee under a forged will takes a valid title. The court says: "He in fact purchased in good faith, and that public policy requires this solution of the question. An application for the probate of a will is a proceeding *in rem*, and the judgment of the court upon it is binding upon all the world until revoked or set aside.<sup>4</sup> Now, it has often been held that acts done under authority by the judgment of a court having jurisdiction of the estate, even where it is being administered under a forged will, are just as valid and effectual as if the will had been genuine; that a payment voluntarily made to the executor named in a forged will is a valid discharge of the debt, though the will may be afterward set aside and annulled, the debtor cannot be required to pay the debt a second time. If the pretended will had required the executors to settle the will of Renn in the probate court, the acts done by them in pursuance of the orders of the court carrying into effect provisions of the will, could not be impeached or set aside to the injury of innocent parties, because they have a right to rely upon the validity of the judgment of the court.<sup>5</sup>

Weston v. Weston, 14 Johns. 428; Y. 466.

Griffith v. Frazier, 8 Cranch, 9.

<sup>1</sup> Johnson v. U. S., 5 Mason, 425.

<sup>2</sup> U. S. v. Primrose, Gilp. 58, Smith v. Fenner, 1 Gall. 171.

<sup>3</sup> Allen v. Dundas, 3 T. R. 125; Spencer v. Spencer, 1 Gall. 623, Rodriguez v. East River Bank, 63 N.

<sup>4</sup> Hodges v. Bachman, 8 Yerg. 186;

Scott v. Calvit, 4 Miss. 185; State v. McGlinn, 20 Cal. 271; 3 Redf. on Wills. 63.

<sup>5</sup> Citing, 15 Monr. 42; 11 Cush. 519, 9 Dana, 41; 9 Pa. St. 234; 6 Porter, 243; 13 Gratt 682.

"Is there any difference in respect to the powers of the executors where the purported will directs the settlement of the estate out of the court? By its judgment the court has declared the instrument to be genuine. This judgment is binding upon all the world until reversed or annulled. Must innocent parties, when they act upon the faith of such judgment, do so at the peril of its being subsequently shown to be erroneous? There is evidently a broad distinction in the position of a party claiming to be an innocent purchaser from one who has merely a forged deed and that of a like purchaser from the devisee in a forged will. In the former case the true owner is neither charged with notice of the forged deed, nor is he in any way committed to or estopped from denying its validity, while in the latter the will is adjudged to be valid by a court of competent jurisdiction in a proceeding to which the heir is a party. While it is in force the heirs are bound by it, and cannot deny its correctness or dispute the validity of the devise. The purchaser from the devisee is authorized by the judgment to buy from him on the faith of a valid judgment of a court of competent jurisdiction, to which the heirs are parties, by which it has been in effect determined that the estate of the testator vested in the vendor on the testator's death. The heirs, being bound by the judgment, they occupy the position of one who has voluntarily parted with or been divested of his title, and then stands by and sees it sold to a purchaser in good faith, without a word of complaint; that he afterward asserts his title and has the judgment reversed, or gets a decree cancelling the probate of the will does not mend the matter. The purchase has been consummated. If, by the subsequent reversal of the judgment, he can annul the purchaser's title, he makes an innocent party the victim of his negligence and delay, and all distinction between *bona fide* and *mala fide* purchasers is destroyed."

§ 334. Mr. Justice Buller said:<sup>1</sup> "The question naturally rises and to be considered is, what is the effect of a probate? It has been contended by counsel that it is not a judicial act, and, secondly, that it is not conclusive. But I am most clearly of the

<sup>1</sup> Steele v. Renn, 50 Tex. 467; S. C., 32 Am. R. 605.

<sup>2</sup> Allen v. Dundas, 3 T. R. 125.

opinion that it is a judicial act, for the ecclesiastical court may hear and examine the witnesses on the different sides, whether a will be or be not properly made. That is the only court that can pronounce whether the will is good, and the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive till it is repealed, and no court of common law can admit evidence to impeach it. Then this case was compared to a probate of a supposed will of a living person, but in such a case the ecclesiastical court has no jurisdiction, and their probate can have no effect; their jurisdiction is only to grant probate of the wills of *dead* persons. The distinction in this respect is this: if they have jurisdiction, their judgment, as long as it stands unrepealed, shall avail in all other places; if they have no jurisdiction, their whole proceedings are a nullity, and inasmuch as "if a testator be circumvented by fraud, the testament loseth its force," and that may be set up in objection to the grant of probate of that part of the will which is effected by the fraud. It has in a highly interesting case<sup>1</sup> been held that after a will and codicils had in a contested suit been admitted to proof in the ecclesiastical court, the court of chancery had no jurisdiction either to set aside one of the codicils, for fraud alleged to have been practiced upon the testator, or to declare the persons who had been guilty of the fraud, and to have reaped a benefit for themselves by inducing the testator to alter his will in their favor, trustees for the persons they induced the testator to cut off. Their opinion seemed to have been in that case, that independently of the prior determination in the ecclesiastical court, the court of chancery had no jurisdiction in the matter. So a decree or decision in an action in a probate court in regard to which of two parties are next of kin, and the court finds that one of them is next of kin, and issues letters of administration to that one, the decree will be conclusive evidence of the relationship of the parties in any other court for a distribution of the estate.<sup>2</sup>

<sup>1</sup> Allen v. McPherson, 5 Beav. 469; 1 H. L. C. 191.

Meluish v. Milton, L. R. 3 C. H. D. 27; Da Costa v. Villa Real, 2 S. T. R. 961; Bunting's Case, 2 Co. 355; Kenn's Case, 4 Co. 136; S. C., 1 Phil 133, &

<sup>2</sup> Barr v. Jackson, 1 Y. & C. 25; Eng. Chan. 585; Thomas v. Ketterinck, 1 Ves. Sr. 333; Bouchier v. Taylor, 4 B. P. C. 708; Hobbs v. Henning.

§ 335. Another well settled principle of law is that the grant of letters testamentary or of administration, are not notice in foreign States or countries, nor are probate proceedings of States recognized in another with anything like the decree of conclusiveness that they have in the State from whence they emanate. In fact, they have no effect whatever in other States, and an administrator or guardian will not be recognized as a party beyond the territorial jurisdiction of the court from which he derives his powers. He is not even permitted to bring a suit jointly with a domestic administrator.<sup>1</sup> Chief Justice Marshall stated that it was on these grounds: "all rights to personal property are admitted to be regulated by the laws of the country where the testator lived; but suits for those rights must be governed by the laws of that country in which the tribunal is placed."<sup>2</sup>

§ 336. No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country.<sup>3</sup> But there are, of course, some qualifications to this rule, not in fact denying the validity of the general rights and acts of a foreign executor or administrator arising under the *lex loci*, but only when he goes abroad to act, sue, or be sued, that he is regarded as without power. While his title is complete under his foreign letters, he can bring an action (in another State as the personal representative) for trover,<sup>4</sup> voluntary payments to and receipts by him are conclusive. A recovery by a foreign administrator is a bar to an action here by a domestic administrator for the same demand, and there is no distinction between administrators, &c., in the various States and foreign ones; the same rule applies in both instances. In an action in New York by a New York administrator for the death of the intestate caused by negligence in another State, his letters

17 C. B. (N. S.) 826; Bainbridge v. Baddely, 2 Phill. 795; Toulmin v. Copeland, 2 Phill. 711; Behrens v. Sieveking, 2 Myl. & C. 682; Hunter v. Stewart, 31 L. J. N. S. Ch. 346; R. v. Hutchings, L. R. 6 Q. B. D. 300; Aboulloff v. Oppenheimer, L. R. 10 Q. B. D. 295.

<sup>1</sup> Dickenson v. McGraw, 4 Rand. 158.

<sup>2</sup> Dixon v. Ramsay, 3 Cranch, 319.

<sup>3</sup> Trecothick v. Austin, 316; Story Conflict of Laws, 431, note 2.

<sup>4</sup> Atkins v. Smith, 2 Atk. 63; Doolittle v. Lewis, 7 Johns. 49; Stevens v. Gaylord, 11 Mass. 264.

are conclusive of his right to recover.<sup>1</sup> In some of the States administrators and executors are allowed to sue, but where a domestic executor or administrator is appointed he takes precedence over a foreign one; but it is well settled that a probate of one State cannot be received as such to effect the title to land in another. This is on the ground of the *lex loci*.<sup>2</sup> It is strange that it should be so when the constitution of the United States expressly says full faith and credit shall be given to the records, public acts and judicial proceedings of other States.<sup>3</sup> In *Bush v. Sheldon*, a sale of land under a decree of the probate court, for want of personal estate, was held unimpeachable by the heir in an action of ejectment, because he was a party in the probate court, and a decree of a probate court establishing a will is conclusive not only to the personal but to the real estate, the power given to the court being the same in both instances.

§ 337. Independent of the modifications made by the statutes of the various States in regard to the various tribunals of which we are now treating (and there are in all the States in the Union courts created by statute having jurisdiction of the real and personal estate of decedents), their decrees are conclusive, and no court can impeach them until they are reversed, or set aside by appellate courts. Such courts being creatures of the statute or special enactment, they are treated as inferior courts or courts of limited jurisdiction, and in pleading their decrees jurisdiction must be shown, and when once shown to have attached, they are effectual and conclusive until annulled on appeal, and cannot be impeached collaterally.<sup>4</sup> In New York it has been held that the

<sup>1</sup> *Leonard v. Nav. Co.*, 84 N. Y. 48, S. C., 38 Am. R. 491.

<sup>2</sup> *McCormick v. Sullivant*, 10 Wheat. 192.

<sup>3</sup> *Stevens v. Gaylord*, 11 Mass. 264; *Hull v. Blake*, 13 Mass. 153.

<sup>4</sup> *Merrill v. Harris*, 26 N. H. 142; *Barney v. Chittenden*, 2 Greene (Ia.) 165; *Frisby v. Harrison*, 30 Miss. 452, *Jones v. Chase*, 55 N. H. 188, *Torrance v. Torrance*, 53 Pa. St. 505, *James v. Williams*, 31 Ark. 175; *Brock v. Frank*, 51 Ala. 85; *Stephen v. Ellis*, 35 Mich. 446; *Haynes v. Meek*, 10

Cal. 110; *Bradshaw's Appeal*, 3 Giant's Cas. 109; *Rogers v. King*, 22 Cal. 71; *Wainfield*, in re, 22 Cal. 51; *Hurlbut v. Wheeler*, 40 N. H. 73; *Waid v. State*, 40 Miss. 108, *Burlingame v. Brown*, 5 R. I. 110; *Laurence v. Englesby*, 24 Vt. 42; *Cook's Estate*, 14 Cal. 130, *Holmes v. Dabbs*, 15 La. Ann. 501; *Kennedy v. Wachsmuth*, 12 S. & R. 171; *Strouffer v. McCauley*, 45 Ga. 74; *President, &c. v. Groff*, 14 S. & R. 181; *Lockhart v. John*, 7 Pa. St. 137; *Merklein v. Trapnell*, 24 Pa. St. 42; *Gilmore v. Rogers*,

recital of the presentation of an account in a surrogate's order is insufficient; the fact of its presentation must be affirmatively shown. So, where there are irregularities in granting letters of administration, the court having jurisdiction of the subject matter and person, and thereby fully empowered to act by refusing or granting such letters, a person so appointed becomes the administrator *de facto*; the regularity of his appointment cannot be questioned in a collateral proceeding, but must be held conclusive except in a direct proceeding for reversal.<sup>1</sup> The execution of an additional bond estops both the principal and surety from controverting the probate court's jurisdiction in any proceeding or action. The sureties have no more right than the principal to deny assets. Because, by their bond, they are bound by the acts of the administrator co-extensively with his liability, and cannot deny assets; for the recital in the bond shows that there were assets.

§ 338. As to the effect of the decree of a spiritual court in estopping the parties to the suit, with respect to a question incidentally determined therein upon opening up the same question in another court, in a suit having a different object, much discussion arose in the case of *Barrs v. Jackson*.<sup>2</sup> In that case, the Lord Chancellor Lyndhurst, reversing a decretal order of the Vice Chancellor, held the judgment of an Ecclesiastical Court, in a suit for *administration* turning upon the question of which of the parties was next of kin to the intestate, to be conclusive upon that question in a subsequent suit in a court of chancery, between the same parties, for *distribution*. The judgment was based upon the ground that the House of Lords had decided that the court of chancery, in exercising its concurrent jurisdic-

41 Pa. St. 120; Runyan's Appeal, 27 Pa. St. 122; Keech v. Rinehart, 10 Pa. St. 242; Welty v. Ruffner, 9 Pa. St. 225, Baskin's Appeal, 38 Pa. St. 68; Vandervoort's Appeal, 43 Pa. St. 462; Potts v. Wright, 82 Pa. St. 498; Lowe v. Gruice, 69 Ala. 80; Lesseps v. Lapere, 34 La. Ann. 112; Finley v. Robertson, 17 S. C. 435; Exendine v. Morris, 76 Mo. 416; Blankenhaker v. Bank, 85 Ind. 459; Davis v. Grieve, 32

La. Ann. 420; Boston v. Robbins, 126 Mass. 384; Barney v. Drexel, 12 F. R. 393; Seminary v. Gage, 12 F. R. 398; Brown v. Lanman, 1 Conn. 467; McPherson v. Cunliff, 11 S. & R. 422; Scott v. Hancock, 13 Mass. 168; Dickenson v. Hayes, 31 Conn. 417.

<sup>1</sup> Wright v. Walbaum, 93 Ill. 555; Morgan v. Locke, 28 La. Ann. 806.

<sup>2</sup> Young v. Collyer, 20 Eng. Chancery, 583.

tion as to distribution, was concluded by judgments of the spiritual courts in granting administration and not at liberty to re-examine the points decided in their peculiar jurisdiction. The principles laid down in the judgment of the Vice Chancellor are, however, wholly untouched by the reversal, and that judgment presents a very full and clear statement of the law of estoppel by adjudication in a former suit, considered with reference to the conditions of its operation. The Vice Chancellor proceeded, after a discussion of the leading English authorities, to state his opinion of the law, as derived from those and other authentic sources, to be, that "generally the judgment neither of a concurrent or exclusive jurisdiction, is (whether receivable or not receivable) conclusive evidence of any matter which came collaterally in question before it, though within the jurisdiction, or of any other matter incidentally cognizable, or of any matter to be inferred by argument from the judgment; and that a judgment is final only for its proper purposes and object," (after citing numerous cases to illustrate the injustice and absurdity that would flow from holding decisions upon facts in proceedings *inter partes* to be conclusive upon the parties for all purposes), his honor proceeded to say: "Lord Ellenborough certainly, and the Court of King's Bench, in *Outram v. Morewood*, decided most accurately, with reference to the pleadings in that action at common law, and that an allegation on record upon which an issue has been once taken and found, is, between the parties taking it, conclusive according to the finding thereof, so as to estop them respectively from litigating that fact once so tried and found. The action, however, in *Outram v. Morewood*, raised as to the same property, and for the same purpose, the same issue as was raised and tried in the action, the judgment wherein was pleaded; and there are material points of distinction between the system of pleading of the English courts of common law and those of other courts of justice. But it is, I think, to be collected, that the rule against re-agitating matter adjudicated, is subject generally to this restriction,—that however essential the establishment of particular facts may be to the soundness of a judicial decision; however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct ob-  
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be, those facts are not at all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question; provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. This limitation to the rule appears to be consistent with reason and convenience, and not opposed to authority. I am not now referring to the law applicable to certain prize and admiralty questions, which are governed by principles in some respects peculiar. On the whole, I am not prepared at present to say that, according to the proper sense of the expression, the judgment of the Ecclesiastical Court between these parties was directly upon the point of the alleged illegitimacy of R. J. S., and had the establishment of that supposed fact for its proper purpose and object, so as to render his illegitimacy *rem judicata* between the parties on a question of distribution."

§ 339. The principles so ably enunciated are not confined to judgments and decrees of spiritual and probate courts, but are of general application to the law of estoppel. The practical results to which the opinion points have the sanction of additional authority in the cases already referred to, and also in regard to estoppel by matter of writing or deed, and will doubtless be found applicable to every portion of this important subject. There is this difference between orders and decrees made by this class of tribunals, and decrees exclusively *in rem*; while the latter bind the whole world, the former are conclusive only between the parties who claim under or through them, and are not even conclusive upon them unless they have had actual or constructive notice. The probate of a will, where the court has jurisdiction, is conclusive unless vacated by an appeal. Whether the questions arising in the probate court were correctly or incorrectly decided as to the competency of evidence, can never be made a matter of inquiry in a court of common law, to affect that adjudication; no other court can declare the will void, or collaterally examine the correctness of the order or judgment.<sup>1</sup>

<sup>1</sup> Lewis' Heirs v. Executors, 5 Mill. Greve, 33 La. Ann. 420; Lebrews La. 337; Cecil v. Cecil, 19 Md. 72; Succession, 31 La. Ann. 212; Orr v. Tibbetts v. Tilton, 4 N. H. 421; McO'Brien, 55 Tex. 149. Hubbard v. Lean v. Weeks, 65 Me. 411; Davis v. Hubbard, 7 Oreg. 42; Finley v. Rob

By statutory provision the probate may be set aside in a superior tribunal in some States.<sup>1</sup> A decree settling an account is conclusive; it cannot be impeached in an action on a probate bond, nor by a bill filed in equity to compel an account. In proving a sale of real estate made under the decree of one of these courts, jurisdiction must be shown, and it makes no difference how erroneous the proceedings may have been; they are conclusive until annulled or reversed on appeal, and they cannot be impeached collaterally.<sup>2</sup> Such proceedings are *in rem* against the estate and not *in personam*, and they bind all those claiming under the testator or intestate, and even divest the lien of a judgment,<sup>3</sup> and as such they are binding on the land like the condemnation of a court of exchequer or admiralty on goods. In supporting these sales irregularities should be overlooked, purchasers should not be affected by the laches of officers. Their regularity is to be presumed after a lapse of years, and the record saying that the party appeared, or other pertinent matter, has been held conclusive.<sup>4</sup> An administrator is estopped, in a collateral proceeding, to deny a recital in a record that he had appeared and filed his accounts for a partial settlement. Such a decree is like one in chancery on which a sale is had, or a judg-

inson, 17 S. C. 435; Exedine v. Morris, 76 Mo. 416; Berney v. Diexel, 12 F. R. 393; Seminary v. Gage, 12 F. R. 398; Pratt v. Whittle, 16 S. C. 41; Patten v. Tallman, 27 Me. 17; Loosemore v. Smith, 12 Neb. 343; Dublin v. Chadbourne 16 Mass. 433; Nowell v. Lesseur, 33 Ga. t. 223; London v. R. R. Co., 88 N. C. 584; Nav. Co. v. Green, 3 Dev. 434; Granberry v. Moon, 1 Dev. 456; Barwick v. Wood, 3 Jones L. 306; Hampton v. Hardin, 88 N. C. 592.

<sup>1</sup> Leighton v. Orr, 44 Iowa, 679; Havelick v. Havelick, 18 Iowa, 418; Gilruth v. Gilruth, 40 Iowa, 346

Freeman v. Rahm, 58 Cal. 111; Lowe v. Gruice, 69 Ala. 80; Lesseps v. Lapere, 34 La. Ann. 112; Finley v. Robertson, 17 S. C. 435; Poor v. Boyce, 12 Tex. 450; Hunt v. Horton, 12 Tex. 285; Haynes v.

Meek, 10 Cal. 110; Tucker v. Harris, 13 Ga. 1; Burdett v. Silsbee, 15 Tex. 61.; Cox v. Davis, 17 Ala. 714; Williams v. Sharp, 2 Ind. 10; Leav v. Hunsucker, 28 Pa. St. 115; Jenkins v. Robinson, 4 Wend. 43; Jackson v. Crawford, 12 Wend. 53; Moers v. White, 6 John. Ch. 60; Brown v. Lanman, 1 Conn. Bush v. Sheldon, 1 Conn. 170; McPherson v. Cundiff, 11 S. & R. 423; Lelm v. Snyder, 7 S. & R. 166; Thompson v. Tolmie, 2 Peters. 157; Judge & Co. v. Fillmore, 1 Chip. 423; Stoll's Estate, in re, 52 Cal. 413; Leanett v. Malone 54 Ala. 19.

<sup>2</sup> McPherson v. Cundiff, 11 S. & R. 422; Gerard v. Basse, 1 Dall. 119.

<sup>4</sup> Bolton v. Brewster, 32 Barb. 389; Peterman v. Watkins, 19 Ga. 153; Daires v. McDaniel, 47 Ga. 145; Thompson v. Perryman, 45 Ala. 619

ment at law or a sheriff's sale. The purchaser is not bound by the matters prior to the decree or judgment, except to jurisdiction and parties.

§ 340. A judgment, decree, sentence, or order, passed by a court of competent jurisdiction, which transfers, creates, or changes a title, or any interest in the estate, real or personal, or which settles or determines a contested right, or which fixes a duty upon one of the parties litigant, is not only final as to the parties themselves, and all claiming by or under them, but furnishes conclusive evidence to all mankind that the right, interest or duty belongs to the party to whom the court adjudged it; it is admissible in favor of any person who may be interested to prove the existence of such right or duty as a fact.<sup>1</sup> Probate court proceedings, where the courts have jurisdiction, cannot be questioned in a suit in chancery by the wards against the guardian.<sup>2</sup>

§ 341. Such courts are courts of original, exclusive and general jurisdiction of the sale and disposition of the real property belonging to, and the distribution of, deceased persons' estates, and the principle that matters once judicially determined cannot again be called in question by parties or privies, is as binding and controlling in equity as at law. When the jurisdiction of the probate court has attached and become complete, its decree on final settlement of an administration is of equal dignity with the judgment or decree of any other court of law or equity, and is conclusive on parties and privies, not only as to facts actually litigated and decided, but of all facts necessarily involved in the rendition of the judgment. A court of chancery can no more interfere with or annul such decree than it can the judgment of any other court. A decree on final settlement of an administration, rendered by the probate court after jurisdiction has attached

<sup>1</sup> *Hudson v. Smith*, 39 N. Y. Superior, 452; *Ryan v. Maxey*, 43 Tex. 192; *Greenwood v. Murray*, 26 Minn. 259; *Lowe v. Gruice*, 69 Ala. 80; *Lesseps v. Lapere*, 34 La. Ann. 113; *Finley v. Robertson*, 17 S. C. 435; *Porche v. Ledoux*, 12 La. Ann. 350; *McPherson v. Cundiff*, 1 S. & R.

533; *Stone v. Peasley*, 28 Vt. 716.

<sup>2</sup> *Lynch v. Rotan*, 39 Ill. 15; *Watson v. Hutto*, 27 Ala. 513; *Foust v. Chamblee*, 51 Ala. 75; *Ford v. Newcomer*, 14 La. Ann. 706; *Farrar v. Olmstead*, 24 Vt. 123; *Brent v. Grace*, 30 Mo. 253; *Gardner v. Montague*, 16 La. Ann. 299.

and become complete, is as binding and conclusive upon minors represented by a guardian *ad litem*, as upon parties *sui juris*. The conclusive effect of such adjudications as are known as final settlements of accounts is based upon the recognized necessity of having an end to litigation, and the principle embodied in the maxim *res judicata pro veritate accipitur*. In the determination of the rights of creditors, distributees on final settlement, between them and the administrators or executors, the function of the judge is judicial. He hears and determines, adjudges and orders, in accordance with the *law of the land*. His adjudication is final and conclusive, unless in the manner provided by law his judgment is reversed or set aside in a direct proceeding, as on appeal, writ of error or review. The maxim *nemo debet bis vexari pro una et eadem causa*, which is also applicable for the reason that what has been once determined by a court of competent jurisdiction is finally disposed of, and the proper parties having their rights adjudicated in one proceeding are not to be frequently cited into court to re-litigate matters once adjudicated, nor are they to be vexed by continued litigation, for it would be as great a wrong upon them as it would be to the public, who have an interest in the termination of litigation. The principle applicable to such transactions may be thus stated: The decree of a court having probate jurisdiction, rendered upon the final settlement of an executor or administrator, is conclusive upon all parties to it, of every matter involved, constituting a bar to further proceedings concerning the same matter, not only in the courts of probate jurisdiction, but in all other courts.<sup>1</sup> They are im-

<sup>1</sup> Bowers v. Williams, 34 Miss. 324; Harty's Appeal, 2 Grant Cas. 83; Hartman's Appeal, 36 Pa. St. 70; Light's Appeal, 22 Pa. St. 445; Baker v. Runkle, 41 Mo. 392; Probate Court v. Merriam, 8 Vt. 234; McFadden v. Geddis, 17 S. & R. 336; Schaeffer, Succession of, 13 La. Ann. 113; Treadwell v. Herndon, 41 Miss. 38; Elwood v. Deifendorf, 5 Barb. 398; Brashears v. Hicklin, 54 Mo. 102; Fish v. Lightner, 41 Mo. 268; Bulkley v. Andrews, 39 Conn. 524; Jones v. Coon, 13 Miss. 751; Pinner v. Flanigan, 17 Tex. 7; Lowrie's

Appeal, 1 Grant Cas. 373; Lyon v. Odom, 31 Ala. 234; Salstonstall v. Riley, 28 Ala. 164; Robinett's Appeal, 36 Pa. St. 174; Leaverton v. Leaverton, 40 Tex. 218; Caldwell v. Lockbridge, 9 Mo. 362; Jones v. Brinker, 20 Mo. 37; State v. Roland, 23 Mo. 95; Picot v. Biddle, 35 Mo. 29; Barton v. Barton, 35 Mo. 153; Martin v. Barron, 37 Mo. 301; Murray v. Roberts, 48 Mo. 307; Clyce v. Griswold, 49 Mo. 37; Townsend v. Townsend, 60 Mo. 246; Lewis v. Williams, 54 Mo. 200; Sheetz v. Kirtley, 63 Mo. 417; App. v. Dreis-

peachable only in courts of equity, for fraud,<sup>1</sup> but a devastavit on part of the administrator, or a fraudulent concealment of assets, or any other fraudulent transaction, cannot be made the basis of relief against the decree rendered on final settlement, when the facts were known and could have been presented and litigated on the settlement.<sup>2</sup> In some few States, by statutory provision, they may be impeached for mistake, or in the mode and for the reasons given in the statutes for such adjudications.<sup>3</sup> The allowance of a claim against a decedent's estate is a judgment and

bach, 2 Rawle, 287; Horn v. Greyson, 7 Port. 270; Jones v. Coon, 13 Miss. 751; Mallet v. Dexter, 1 Curt. 178; Sever v. Russell, 4 Cush. 513; Bunting's Appeal, 4 W. & S. 469; Patterson v. Bell, 25 Iowa, 149; Smith v. Hurd, 8 Miss. 188; Hauper v. Archer, 17 Miss. 71; Searles v. Scott, 23 Miss. 94; Groff's Appeal, 45 Pa. St. 379; Arnold v. Mower, 49 Me. 561; Hatcher v. Dillard, 70 Ala. 343; Waring v. Lewis, 53 Ala. 615; Hutton v. Williams, 60 Ala. 107; Moore v. Lesseur, 33 Ala. 287; Glenn v. Billingsted, 64 Ala. 343; Guinnet v. Henderson, 66 Ala. 521; Kelly v. West, 80 N. Y. 139; Gerould v. Wilson, 81 N. Y. 573; McWilliams v. Kalback, 55 Iowa, 110; Jones v. Fellows, 58 Ala. 343; McCalley v. Robinson, 70 Ala. 432; George v. Lee, 6 Humph. 61; Allsup v. Allsup, 10 Yerg. 283; Whittaker v. Whittaker, 10 Lea, 93; Reynolds v. Brumagim, 54 Cal. 254; Daniels v. Smith, 58 Iowa, 577; Knowes v. Mowery, 57 Iowa, 20; Shackelford v. Cunningham, 41 Ala. 203; Ostrom v. Curtis, 1 Cush. 461; Moore v. Fields, 42 Pa. St. 467; Abbott v. Bradstreet, 3 Allen, 587; Burlingame v. Brown, 5 R. I. 410; Brodericks's Will, 21 Wall. 503; Exton v. Zule, 14 N. J. Eq. 501; Downs v. Downs, 17 Ind. 95; McAfee v. Phillips, 25 Ohio S. 374; Hendricks v. Huddleston, 13 Miss. 422; Musick v. Beebee, 14 Kas. 47;

Brown, Succession of, 27 La. Ann. 328; Harlow v. Harlow, 65 Me. 448; Stull v. Davidson, 12 Bush, 167; Foust v. Chamblee, 51 Ala. 75, State v. Hull 53 Miss. 636; Anderson, Succession of, 12 La. Ann. 95; Grayson v. Weddell, 63 Mo. 523; Montgomery v. Johnson, 31 Ark. 74; Burd v. McGregor, 2 Grant's Cas. 353; Ringgold v. Stone, 20 Ark. 526; Barton v. Barton, 25 Mo. 158, Ordinary v. Kershaw, 14 N. J. Eq. 527; Duke v. Duke, 26 Ala. 673; Arnold v. Mower, 49 Me. 561; Sparhawk v. Bucl, 9 Vt. 41; Bush v. Hampton, 4 Dana, 83; Waring v. Lewis, 53 Ala. 615.

<sup>1</sup> Strong v. Wilkinson, 14 Mo. 116; Jones v. Brinker, 20 Mo. 37; Dooley v. Dooley, 14 Ark. 122; Heyer v. Moorehouse, 20 N. J. L. 135; Engle v. Crombie, 21 N. J. L. 614; Allen v. Clark, 2 Blackf. 343; Davis v. Cowdin, 20 Pick. 510; Tibbits v. Tilton, 31 N. H. 273; Green v. Creighton, 18 Miss. 159; Lorne v. White, 8 Dana, 45; Sheetz v. Kirtley, 62 Mo. 417; Clyde v. Griswold, 49 Mo. 37; Lewis v. Williams, 54 Mo. 200.

<sup>2</sup> Waring v. Lewis, 53 Ala. 615; ante for cases as to what is included in a judgment.

<sup>3</sup> Black v. Whitall, 9 N. J. Eq. 572; James v. Mathews, 5 Ired. Eq. 28; Walker v. Wooten, 18 Ga. 119; Ray v. Dougherty, 4 Blackf. 115; Kachlein's Appeal, 5 Pa. St. 95; Pew v. Hastings, 1 Barb. Ch. 452.

merges the claim in the judgment.<sup>1</sup> So, a decree dismissing a trustee at his own request is conclusive as to his subsequent liability as trustee.<sup>2</sup> Nor can their decrees or orders respecting the sale of real estate of a decedent be collaterally assailed when jurisdiction is shown to have attached.<sup>3</sup>

§ 342. In the celebrated *Gaines* case, the United States Supreme Court held that the probate of a will, duly received to probate by a State court of competent jurisdiction, was conclusive of its validity and contents. But a probate of a will in one State or county will not establish its validity as a bequest or devise of lands or chattels in another. But probate court proceedings, where the court has jurisdiction, cannot be questioned. But it is a universal and well-settled principle of law, in cases of courts of this kind, that the decrees of such courts are voidable collaterally by showing lack of jurisdiction. Judgments of these tribunals, like other judicial acts, may be impeached by strangers to the suit by evidence of fraud or collusion. But this proposition must always be qualified with the fact that the person seeking to impeach the former was neither party or privy to it. If he stand in either of these relations, he shall not be heard to allege fraud, even in the mode of proceeding by which he is condemned; of course he shall not in the foundation and merits.<sup>4</sup> But while third persons may impeach, they are also protected by fraudulent judgments, where they act under them *bona fide*. While judgments of courts that are obtained by fraud have been considered as absolutely void, all acts performed under them are valid as respects third persons.<sup>5</sup>

§ 343. For certain purposes, and within certain limits, every sovereignty may, without any violation of principle, exert its authority over the real property, subject to and within its juris-

<sup>1</sup> *Jameson v. Barber*, 56 Wis. 630; *Price v. Dietrich*, 12 Wis. 626; *Bank v. Kidder*, 20 Vt. 519; *Rix v. Nevens*, 26 Vt. 389; *Mitchell v. Mayo*, 16 Ill. 88.

<sup>2</sup> *Johnson's Appeal*, 9 Pa. St. 446; *Simpson's Appeal*, 9 Pa. St. 416.

<sup>3</sup> *Rivers v. Thompson*, 43 Ala. 633; *Walker v. Mock*, 39 Ala. 568.

<sup>4</sup> *Peck v. Woodbridge*, 3 Conn. 36;

*Woods v. Lee*, 21 La. Ann. 500; *Ward v. Hudspeth*, 41 Ala. 315; *McCauley v. Harvey*, 49 Cal. 497; *Brown v. Christie*, 27 Tex. 73; *George v. Norris*, 23 Ark. 121, *Cassel v. Case*, 14 Ind. 393; *Iverson v. Loberg*, 26 Ill. 179; *Iddings v. Cairns*, 2 Grant's Cas. 88, *Sturdy v. Jacoway*, 19 Ark. 499.

<sup>5</sup> *Sims v. Slacum*, 3 Cranch, 306; *McDonald v. Napier*, 14 Ga. 89.

diction, by statutes operating *in rem*, which are not limited to the rights of particular persons, and thereby estop all the world from controverting the title thus transferred or created by such proceedings.<sup>1</sup> Thus, the judgment of a court upon the report of a committee, under the laws of a State, which empowers that court to establish the disputed boundary lines between adjoining towns, is a judgment *in rem*, and conclusive upon all persons. The effect of such judgment is not merely prospective. It is an adjudication not only of where the line is, but where it always has been, since it was established by the incorporation of the towns, and is therefore conclusive upon the parties in a suit against one of the towns, pending when the judgment was rendered, and in which is involved an inquiry into the true location of the boundary.<sup>2</sup>

§ 344. Laws have been enacted by almost every government, rendering adverse possession a bar to every right which is not enforced by action within a certain period of time. So the appropriation of land for public purposes, by virtue of the right of eminent domain, must, as a matter of necessity, divest the title of strangers as well as parties to the proceedings.<sup>3</sup> No Legislature will be presumed to have enacted any law that would permit any man to be deprived of his property without giving him an opportunity to be heard, although there may be provision made for making service by publication when it cannot be made *in personam*. All actions brought for the recovery of title to land are in the nature of proceedings *in rem*, whether commenced by service *in personam* or by publication, yet the judgment is limited to the estate and to those who have been made parties either by service of process or by appearance. And the title of third persons is neither barred or affected by any order or execution based on such a judgment. The proceedings of probate, surrogate, orphans' and guardians' courts of this country, for the sale of the real estate of an ancestor, for the payment of his debts, or for the purpose of facilitating or effecting a partition or distribution among his heirs, are commonly instituted by petition or publica-

<sup>1</sup> Jeter v. Hewett, 22 How. 352.  
Barten v. Bank, 10 Mo. App. 76

<sup>3</sup> Stewart v. Board, &c., 3 Cush  
479.

<sup>2</sup> Pitman v. Albany, 34 N. H. 577.

tion, without any direct or personal service of process, and are sometimes described as proceedings *in rem*. The order or decree in such cases is binding on all who claim title by descent from the ancestor, whether they are or are not actually before the court when it is made.<sup>1</sup> But the difference between them and a real judgment *in rem* is, that the estoppel is limited to the title of those whom the law regards as parties or privies to the proceeding, and will not be binding even on them unless they have had actual or constructive notice in the manner prescribed by statute.

§ 345. Decisions *in rem* are conclusive, not only upon the parties actually litigating in the cause, but upon the whole world, for the reason, that in cases of property seized and proceeded against, every one who has a right to appear and assert his own rights by being made or becoming a party to the proceedings, and upon the maxim, *Interest reipublicae ut sit finis litium*. It is essential to the peace and tranquillity of the community that questions of this kind should not be left in doubt, but that our domestic relations should be clearly defined and conclusively settled and at rest; and so well are they settled, that decrees *in rem* cannot be set aside or impeached collaterally, either by parties or strangers, on any other ground than want of authority, or jurisdiction of the court in which the judgment was rendered.

<sup>1</sup> Clemens v. Clemens, 37 N. Y. 74; Freeman v. Rahm, 58 Cal. 111; Bar-Philadelphia v. Girard, 45 Pa. St. 9; tero v. Bank, 10 Mo. App. 76.

## CHAPTER VI.

## JUDGMENTS OF INFERIOR COURTS AND COURTS OF LIMITED JURISDICTION.

SECTION 346. Superior courts are presumed to act by right and not by wrong; consequently their acts and judgments are conclusive in themselves, unless clearly beyond the jurisdiction of the tribunals from whence they emanate.<sup>1</sup> The jurisdiction of limited and inferior courts must be shown to confer validity upon their acts, and when the facts necessary to give jurisdiction are not apparent upon the face of the record, or are not proven *aliunde*, the whole will be void and set aside as a nullity when called in question in any collateral proceeding. The strictness with which the proceedings of inferior tribunals are scrutinized, applies only to the question of jurisdiction, and the existence of jurisdiction, when that is proved or conceded, the maxim *omnia præsumentur rite et solemniter esse acta* applies as well as to other courts of general jurisdiction. This proceeds upon the principle that estoppels must be mutual; that nothing that does not bind both parties can be conclusive upon either. When the proceedings of inferior courts set forth facts necessary to give jurisdiction, it will be held to exist without proof *aliunde*. But unless courts of inferior and limited jurisdiction show that the matters in litigation were within the scope of their powers, the presumption is that they were beyond them, and consequently will be treated as *coram non iudice*, and therefore void.<sup>2</sup>

<sup>1</sup> Grignon v. Astor, 2 How. 319; Briggs v. Clark, 8 Miss 457; Cook v. Duling, 18 Pick. 393; Venable v. McDonald, 4 Dana, 336; Huntington v. Charlotte, 15 Vt. 46; Wells v. Mason, 5 Ill. 84; Wright v. Watson, 11 Humph. 529; Morgan v. Burnet, 18 Ohio, 535; Pennington v. Gibson, 16 How. 65; Hall v. Law, 2 W. & S. 185.

<sup>2</sup> Perrine v. Farr, 22 N. J. L. 356; Kemp v. Kennedy, 5 Cranch, 172; Albee v. Ward, 8 Mass. 86; Walbridge v. Hall, 3 Vt. 114; Smith v. Rice, 11 Mass. 513; Williams v. Blunt, 2 Mass. 213; Turner v. Bank, 4 Dall. 11; Hunt v. Hapgood, 4 Mass. 123; Clapp v. Beardsley, 1 Aik. 168; Hall v. Howd, 10 Conn. 514; Hendrick v. Cleveland, 2 Vt. 329; Powers v.

§ 347. It matters not what the general powers and jurisdiction of a court may be; if it act without authority in the particular case, its judgments and orders are mere nullities, not voidable, but simply void, protecting no one acting under them, and constituting no hindrance to the prosecution of any right.<sup>1</sup> The distinction between courts of limited and of general jurisdiction is this, that when their acts and judgments are relied upon, either as giving a right or furnishing a defense, jurisdiction of the latter is presumed, while that of the former must be proved; but the presumption in favor of the jurisdiction of the court of general jurisdiction is one of fact, and not conclusive. It may be rebutted. If it depends upon the existence of certain facts, and the court has passed upon those facts, the determination is conclusive until its judgment has been reversed or set aside, and this rule is as applicable to the judgments of inferior, as of superior courts.<sup>2</sup>

§ 348. The general principle as to the conclusive effect of what has been regularly determined by a competent tribunal, with regard to the same subject matter in controversy and between the same parties and their privies, applies generally to all the courts in England and this country, whether superior or inferior, whether of record or not record. There is, however, some difficulty in determining whether particular courts are, or are not, inferior within the meaning of the term as used in the books.<sup>3</sup> The use of the words 'superior' and 'inferior,'

People, 4 Johns. 292; Hamilton v. Burum, 3 Yerg. 355, Latham v. Edgerton, 9 Cow. 227; Stockett v. Nicholson, Walker, 75; Wooster v. Parsons, Kirby, 27; Wickes v. Caulk, 5 Har. & J. 36, McKenzie v. Ramsay, 1 Bailey 459, Harvey v. Huggins, 2 Bailey, 267; Don v. Turner, 9 Wheat. 541; Hill v. Pride, 4 Call. 107; Shivers v. Wilson, 5 H. & J. 130; Foster v. Glazener, 27 Ala. 391; Thatcher v. Powell, 6 Wheat. 119; Striker v. Kelly, 7 Hill, 24; Denning v. Corwin, 11 Wend. 647; Ludlow v. Johnson, 3 Ohio, 553, Mitchell v. Runkle, 25 Tex. Supp. 122; Adams v. Jeffries, 12 Ohio, 253;

Cone v. Cotton, 2 Blackf. 82; Earhman v. Jones, 3 Yeig. 483; Barney v. Patterson, 3 Humph. 313; Wight v. Warner, 1 Doug. (Mich.) 384.

<sup>1</sup> Elliott v. Peirsol, 1 Pet. 329.

<sup>2</sup> Staples v. Fairchild, 3 N. Y. 41; Bank v. Judson, 8 N. Y. 254; People v. Liscomb, 60 N. Y. 568.

<sup>3</sup> Nations v. Johnson, 24 How. 195; Judson v. Lake, 3 Conn. 318; Crit v. Tracy, 8 Conn. 268; Gould v. Stanton, 16 Conn. 12; Richard Busteed, The, 100 Mass. 409; Winans v. Dunham, 5 Wend. 47; House v. Wiles, 12 G. & J. 338; Dorsey v. Gassoway, 2 H. & J. 402; Pleasants v. Clements, 2 Leigh,

or 'limited' and 'general,' however apt they may have once been, are less so at this time and place, and their duties, in view of our system and mode of procedure, would be better performed by the terms 'courts of record' and 'courts and tribunals not of record.' A court of record is that where the acts and judicial proceedings are enrolled on parchment for a perpetual memorial and testimony, which rolls are called the records of the court, and are of such high and super-eminent authority, that their truth is not to be called in question.<sup>1</sup> In England probably all courts except the King's, at Westminster, the King's Bench, Exchequer, Bankruptcy and Chancery courts, are termed inferior courts and treated as such. Chief Justice Marshall said,<sup>2</sup> "all courts from which an appeal lies are inferior courts in relation to the appellate court before which their judgments may be carried; but they are not, therefore, inferior courts in the technical sense of those words. They (the words inferior courts) apply to courts of special and limited jurisdiction, which are erected on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed; but this court is not prepared to say that they are absolute nullities which may be totally disregarded." The limitation of jurisdiction does not necessarily imply inferiority.

§ 349. The United States courts are courts of limited jurisdiction. They possess no power except such as is expressly conferred upon them by the power that creates them.<sup>3</sup> They have no jurisdiction of common law offenses, and there is no abstract pervading principle of the common law under which they can take

474, *Morgan v. Patton*, 4 T. B. Mon. 453, *Troutman v. Vernon*, 1 Bush, 452; *McLemoire v. Nuckolls*, 37 Ala. 662; *Goddard v. Long*, 15 Miss. 783.

<sup>1</sup> Ante, ch. 2.

<sup>2</sup> *Kemp v. Kennedy*, 5 Cranch, 173; *Wood v. Maun*, 1 Sumn. 578; *McCormick v. Sullivan*, 10 Wheat. 199;

*Skillem v. May*, 6 Cranch, 267; *Harvey v. Tyler*, 2 Wall. 328.

<sup>3</sup> *U. S. v. Hudson*, 7 Cranch, 32; *U. S. v. Coolidge*, 1 Wheat. 415; *Harrison v. Hadley*, 2 Dill. 229; *Pennsylvania v. Wheeling B. Co.*, 13 How. 563.

jurisdiction. As Federal courts they have no common law jurisdiction, civil or criminal, unless conferred upon them by act of Congress. It is true, that when sitting in a State they administer the common law where it has been adopted by the State. But it is administered as the law of the State, under the authority and direction of the act of Congress, which makes the laws of the State the rule of decision in a court of the United States, when sitting in the State, provided such laws are not contrary to the constitution, laws or treaties of the United States. Yet these courts are not inferior courts. Their judgments and decrees, within the limitation fixed by law permitting an appeal, are as final and conclusive as those of the Supreme Court of the United States; they have the same conclusive effect as all final judgments. The circuit, district and territorial courts of the United States are courts of limited, but not inferior jurisdiction. Their judgments are binding until reversed, and cannot be treated as nullities, or set aside collaterally, for a failure to set forth the facts necessary to give jurisdiction, and the same rule applies to many of the local courts in the different States. The courts which, under the appellations of orphans' courts, courts of probate, surrogates' courts, courts of ordinary, guardians' courts, or whatever name may be given by the statute creating them, which are entrusted with the settlement of the personal estate of decedents, and in subordination to this, with the power to sell real estate when the personal estate is insufficient to meet the charge upon it, are treated in some of the States as inferior tribunals, and their decrees held to be voidable collaterally, by showing a want of jurisdiction either in the cause itself or over the parties,<sup>1</sup> and is applicable with greater force to the acts of such tribunals which are ministerial in their nature as well as judicial; as for example, the grant of letters of administration,<sup>2</sup> and it was held that the appointment of a guardian by a probate court, without annulling or vacating a prior testamentary appointment by the

<sup>1</sup> Chase v. Hathaway, 14 Mass. 222; Conkey v. Kingman, 24 Pick. 115; Wattles v. Hyde, 9 Conn. 10; Hendrick v. Cleveland, 2 Vt. 329; White v. Riggs, 27 Me. 114; Erwin v. Lowry, 7 How. 172.

<sup>2</sup> Holyoke v. Hoskins, 5 Pick. 20; Sigourney v. Sibley, 21 Pick. 101; Creave v. Brust, 3 Dana, 129; Johnson v. Corpenning, 4 Ired. Eq. 216; Flin v. Chase, 4 Denio. 85

father of the ward, was *coram non judice*, and wholly void and might be disregarded in course of subsequent and collateral proceedings.<sup>1</sup> Owing to the limited and inferior jurisdiction of these courts, there can be no reason assigned why the determinations of such tribunals when they transcend their jurisdiction should not be void, or when they fail to take the necessary steps to obtain jurisdiction over the cause and parties.

§ 350. When an inferior court (a court of limited jurisdiction, either in point of place or of subject matter), assumes to proceed, its judgment must set forth such facts as show that it has jurisdiction, and must show also in what respect it has jurisdiction.<sup>2</sup> But it is another thing to contend that it must set forth all the facts or particulars out of which its jurisdiction arises. Thus, if a power of commitment or other power is given to justices of a county, their conviction or order must set forth that they are two such justices of such county, in order that it may be certainly known whether they constitute the tribunal upon which the statute they assume to act under, has conferred the authority to make that order or pronounce that conviction. But although it is necessary that the jurisdiction of the inferior court should appear, yet there is no particular form in which it should be made to appear. The court above, which has to examine, and may control the inferior court, must be enabled, somehow or other, to see that there is jurisdiction such as will support the proceeding, but in what way it shall so see it, is not material, provided it does so see it.<sup>3</sup> The rule, therefore, may be stated to be, that, where it appears upon the face of the proceeding that the inferior court has jurisdiction, it will be intended that the proceedings are regular;<sup>4</sup> but that—unless it so appears—that is, if it appear affirmatively that the inferior court has no jurisdiction, or, if it be left in doubt, whether it has jurisdiction or not—no such intendment will be made.<sup>5</sup> “The old rule for jurisdic-

<sup>1</sup> Holmes v. Fields, 12 Ill. 424.

<sup>2</sup> Harris v. Willis, 15 C. B. 709; Crawford v. Howard, 30 Me. 423; Clark v. Bryan, 16 Md. 71; Adams v. Tiernan, 5 Dana, 394; Gray v. McNeil, 12 Ga. 424; Perrine v. Farr, 22 N. J. L. 356.

<sup>3</sup> Taylor v. Clemson, 11 Cl. & Fin. 610; Reg. v. Ardsley, 5 Q. B. 78.

<sup>4</sup> Barnes v. Keane, 15 Q. B. 75; Baker v. Cave 1 H. & N. 674.

<sup>5</sup> Fairfield v. Gulliver, 49 Me. 360; Potwine's Appeal, 31 Conn. 381; Dempster v. Purnell, 4 Scott, N. R. 39; Barnes v. Keane, 15 Q. B. 75

tion is, that nothing shall be intended to be out of the jurisdiction of the *Superior Court*, but that which specially appears to be so;<sup>1</sup> nothing is intended to be within the jurisdiction of an *inferior* court but that which is expressly alleged." And again, "it is necessary for a party who relies upon the decision of an inferior tribunal, to show that the proceedings are within the jurisdiction of the court."<sup>2</sup>

§ 351. The Probate courts, and courts of like nature, in their jurisdiction are like those of Superior courts. They possess exclusive original jurisdiction in Probate matters, and the care of the estate of deceased persons, and it is provided by the statutes creating such courts, their orders, entries, etc., made on the record of the courts, shall have the full force and effect of judgments. These courts being restricted to this particular branch of business, it in no wise makes them inferior courts, limited and subordinate in their jurisdiction. The jurisdiction of these courts is so exclusive and important, that the same rule of construction is to be made in favor of their jurisdiction. Jurisdiction having once attached, it will not be lost by any irregularity in the mode of exercising that jurisdiction. Every intendment will be made in aid of the validity of the proceedings under such jurisdiction, which will be regarded as equally conclusive with that of courts of superior and general jurisdiction.<sup>3</sup> Such judgments cannot be impeached collaterally for

<sup>1</sup> Gossett v. Howard, 10 Q. B. 435; Peacock v. Bell, 1 Saund. 75.

<sup>2</sup> Boller v. Mayor, 40 N. Y. Superior, 523; Bolton v. Jacks, 6 Rob. (N. Y.) 166; Rowley v. Howard, 23 Cal. 401; Clark v. Blacker, 1 Ind. 215; Conway v. Weaver, 1 Ind. 266; Barnes v. Underwood, 54 Ga. 87; Davie v. McDaniel, 47 Ga. 195; Perrine v. Farr, 22 N. J. L. 356; Higginson v. Martin, 2 Mod. 195; Evans v. Munkley, 4 Taunt. 48; Andrews v. Mares, 1 Q. B. 16; Gray v. McNeal, 12 Ga. 424; Savacool v. Boughton, 5 Wend. 170; Sears v. Terry, 26 Conn. 273.

<sup>3</sup> Probst v. Meadows, 13 Ill. 157; Botsford v. Conner, 57 Ill. 72; Tyer-

man v. Smith, 37 E. L. & Eq. 66; Ogden v. Waters, 12 Kas. 292; Hahn v. Kelly, 24 Cal. 391; Shoemaker v. Brown, 10 Kas. 393; Harris v. Colquitt, 44 Ga. 663; Rose v. Lewis, 3 Lans. 350; Stiles v. Burch, 5 Paige, 135; Wornack v. Wornack, 23 La. An. 351; Rudy v. Ulrich, 69 Pa. St. 177; Penderbeath v. McGilvray, Stu. L. C. 470; Shropshire v. Probate Judge, 5 Miss. 142; Cole v. Leake, 31 Miss. 111; Crippen v. Dexter, 13 Gray, 330; Abbott v. Bradstreet, 3 Allen. 587; Simpson v. Horton, 45 Me. 281; Davie v. McDaniel, 47 Ga. 195; Canjole v. Ferrie, 13 Wall. 465; Castro v. Richardson, 18 Cal. 478; State v. Glynn, 20 Cal. 233; Judson v. Lake, 3 Conn.

mere errors or irregularities, unless they amount to want of jurisdiction, and can only be inquired into by the regular mode of examination which is provided for the investigation of real or imputed errors in judicial proceedings; their force and effect cannot be impeached by parol testimony.<sup>1</sup> The only question that can arise when the validity of a grant of letters testamentary or administration is drawn in question in collateral proceedings, is that of jurisdiction; if that is established no exceptions can be taken to the manner in, or to the ground upon which it is to be enforced.<sup>2</sup> A judgment of an inferior tribunal upon matters not within its jurisdiction is of no force or effect. Thus, a judgment of a justice of the peace, who is required to transfer a cause to another court as soon as it appears to involve title to lands, does not operate as a bar to a subsequent suit upon a cause of action involving title, merely because such cause of action might have been introduced before the justice, in which case it would have been his duty to certify the cause to another court for trial.<sup>3</sup>

§ 352. The judgments of justices of the peace stand on the same footing as courts of record; they are held to be conclusive of every matter that might have been litigated,<sup>4</sup> and cannot be

326; *Gates v. Treat*, 17 Conn. 392; *Thomas v. Pool*, 19 S. C. 323; *Harrison v. Morehouse*, 2 Kerr (N. B.) 584; *Fowler v. Whiteman*, 2 Ohio S. 270; *Harris v. Ferris*, 16 Fla. 84; *Meredith v. Association*, 60 Cal. 621; *Roe v. San Francisco*, 60 Cal. 93; *Parker v. Altschul*, 60 Cal. 880.

<sup>1</sup> *Exton v. Zule*, 14 N. J. Eq. 501; *Hartzell v. Commonwealth*, 42 Pa. St. 455; *Downs v. Downs*, 17 Ind. 95; *Moore v. Fields*, 42 Pa. St. 467; *Burlingame v. Brown*, 5 R. I. 410; *Jones v. Chase*, 55 N. H. 234; *Town v. Lamphere*, 34 Vt. 365; *Randolph v. Doss*, 4 Miss. 205; *Johnson v. Beasley*, 65 Mo. 250; *Dayton v. Mintzer*, 22 Minn. 393; *Giddings v. Steele*, 28 Tex. 750; *Dickenson v. Hayes*, 31 Conn. 417; *Baker v. Coe*, 20 Tex. 429; *Dancey v. Strickling*, 15 Tex. 557;

*Grant v. McKinney*, 36 Tex. 62; *Mix v. Johnson*, 9 La. Ann. 113; *Warner v. Scott*, 39 Pa. St. 27; *Fagg v. Clements*, 16 Cal. 389; *Lightsey v. Harris*, 20 Ala. 409; *Lawrence v. Englesby*, 24 Vt. 43; *Richardson v. Merrill*, 33 Vt. 27; *Timothy v. Farr*, 42 Vt. 43; *Sherman v. Abell*, 46 Vt. 547; *Garner v. State*, 28 Kas. 790; *Thompson v. Blanchard*, 2 Lea. 528.

<sup>2</sup> *Gay v. Monroe*, 12 Wend. 272; *Peck v. Randall*, 1 Johns. 165; *Woodruff v. Cook*, 2 Edw. Ch. 259.

<sup>3</sup> *Goenen v. Schroeder*, 18 Minn. 68; *Gordon v. Kenney*, 36 Iowa, 167.

<sup>4</sup> *Gates v. Preston*, 41 N. Y. 113; *Warner v. Scott*, 39 Pa. St. 274; *Hallock v. Deming*, 69 N. Y. 238; *Reid v. Spoor*, 66 N. C. 415; *Shaver v. Shell*, 24 Ark. 122; *Emery v. Nelson*, 9 S. & R. 12; *Anderson v. Kimbrough*, 5 Cold.

collaterally impeached. The general sessions of Justices of the Peace and Surrogate's courts in New York are inferior courts,<sup>1</sup> and those who rely upon their acts or decrees are required to show that the circumstances were such as to give them jurisdiction. Where a court of general jurisdiction has special authority conferred upon it by statute, it is *quoad hoc*, an inferior or limited court.<sup>2</sup> In England, as well as in the various States in this country, where the jurisdiction of Justices of the Peace is held to be not only limited but inferior, their proceedings are void, and they themselves liable as trespassers, not only when they act without, but when they exceed their authority,<sup>3</sup> but when they attempt to exercise their unquestioned and admitted powers, without pursuing the mode, or in any other, than the manner prescribed by law,<sup>4</sup> they must set forth enough to

260; Farr v. Ladd, 37 Vt. 156; Wilkinson v. Vorce, 41 Barb. 370; Hubbard v. Fisher, 25 Vt. 539; Rountree v. Walker, 46 Tex. 200; Carpenter v. Pier, 30 Vt. 84; Kent v. H. R. Co., 23 Barb. 278; Billings v. Russell, 23 Pa. St. 189; Clark v. McComman, 7 W. & S. 469; Fox v. Hoyt, 12 Conn. 497; Wright v. Hazen, 24 Vt. 143; Turner v. Ireland, 11 Humph. 447; McDonald v. Simcox, 93 Pa. St. 619; Clark v. Thompson, 47 Ill. 25; Conover v. Musgrave, 68 Ill. 60; Wemberley v. Hurst, 33 Ill. 172; Williams v. Ball, 52 Tex. 603; Tarbox v. Hays, 6 Watts, 398; Stevens v. Mangum, 27 Miss. 481; Westmoreland v. Conemaugh, 34 Pa. St. 231; Schuykill v. Monton, 44 Pa. St. 484; Taliaferro v. Herling, 10 Humph. 272; Van Doren v. Horton, 15 N. J. L. 205; Facey v. Fuller, 13 Mich. 527; Zimmerman v. Zimmerman, 15 Ill. 84; Boyd v. Miller, 52 Pa. St. 431; Owen v. State, 55 Vt. 47; Hauer's Appeal, 5 W. & S. 493; Middlebury v. Ames, 7 Vt. 166; Sloan v. McKinstry, 18 Pa. St. 120; Billings v. Russell, 23 Pa. St. 189; Huyghe v. Brinkman, 34 La. Ann. 831; Walker v. Briggs, 11 Vt. 84; Barnard v. Flanders, 12 Vt. 657; Beech v. Rich,

13 Vt. 595; Nye v. Kellam, 18 Vt. 594; Pike v. Hill, 15 Vt. 183; Eastman v. Waterman, 26 Vt. 491; White v. Hawn, 5 Johns. 351; Halcomb v. Cornish, 8 Conn. 375; Judge v. Biggs, 3 N. H. 309; Murdock v. Hicks, 49 Vt. 408; Heagy v. Black, 90 Ind. 534; Shively v. Welch, 20 F. R. 28; Simon-ton v. Hays, 88 Ind. 70; Cox v. Bird, 88 Ind. 412; Woodward v. Baker, 10 Oreg. 491; Townsend v. R. R. Co., 91 Ill. 545; R. R. Co. v. Pound, 22 Ill. 399; Robinson v. Snyder, 97 Ind. 56; Odle v. Frost, 59 Tex. 684; Calvin v. Six, 79 Mo. 198; Roby v. Verner, 31 Kas. 706; Pritchard v. Madden, 31 Kas. 38; McCormick v. Webster, 59 Ind. 105; Hogg v. Link, 90 Ind. 346; Reid v. Mitchell, 93 Ind. 469; Blair v. Hanna, 87 Ind. 298.

<sup>1</sup> Dakin v. Hudson, 6 Cow. 221; Sherman v. Ballou, 8 Cow. 304.

<sup>2</sup> Thatcher v. Powell, 6 Wheat. 114.

<sup>3</sup> Fisher v. McGeir, 1 Gray, 1; Barker v. Stetson, 7 Gray, 53.

<sup>4</sup> Snyder v. Wise, 10 Pa. St. 157; Selby v. Bowen, 3 Chand. 183; Levi v. Moylan, 10 C. B. 189; Bridge v. Frost, 4 Mass. 641.

show that the cause was actually within their jurisdiction as that from its general nature it might have been.<sup>1</sup> This applies equally in pleading as in evidence, and the plea which relies on the judgment of a Justice of the Peace as a justification, must not only show that it was within his jurisdiction, but that all the necessary steps to make that jurisdiction effectual were taken.<sup>2</sup> When jurisdiction is once shown, the presumption is that all matters were rightly done. So where a plea that a defendant has been discharged as a bankrupt or insolvent when jurisdiction is shown, all that is necessary is, to introduce the final order or decree without proving all the intermediate steps.<sup>3</sup> There seems to be no distinction in this particular between inferior courts and those of general jurisdiction; a judgment of an inferior court, acting within the scope of its legitimate authority, with a due observance of all the prescribed modes of proceedings, is equally conclusive, not only against further litigation of the same matter, but in all respects as the judgments of other courts. Its merits can nowhere be collaterally investigated. No error, however palpable, will vitiate it. "An inferior court having acquired jurisdiction, the same intendments will be made in its favor as in the case of superior courts." Courts not of record are like special agents, we "must see their authority" before regarding their decisions as lawful; but, seeing it, we are to respect it. Their authority is not the less certain because specified and confined. "It is well settled, that when the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. The jurisdiction appearing, the same presumption of law arises, that it was rightly exercised, as prevails with reference to the action of a court of superior and general authority." The judgment of every court on a subject within its jurisdiction is conclusive and binding on all other courts, except those only before which it comes by appeal, *certiorari*, or writ of error.<sup>4</sup> The proceedings of any court may be inquired

<sup>1</sup> State v. Magrath, 31 Me. 469; Hill v. Mitson, 8 Exch. 750, Roosevelt v. Kellogg, 20 Johns. 208; Miller v. Chandler, 17 N. B. R. 251.

<sup>2</sup> Turner v. Roby, 3 N. Y. 143.

<sup>3</sup> Brown v. Foster, 6 R. I. 564; <sup>4</sup> Blount v. Darrach, 4 Wash. C. C. Viele v. Blanchard, 4 Greene (Ia.) 657; Groff v. Groff, 14 S. & R. 184; 299; Rowan v. Holcomb, 16 Ohio, 463; Overseers v. Supervisors, 14 Wend.

into by any court where the former proceedings are brought by the party claiming the benefit of them.<sup>1</sup>

§ 353. The acts of inferior courts are not valid and conclusive unless *prima facie* within their jurisdiction, while the acts of superior courts are void when manifestly beyond it. The generality of the above principle in regard to inferior courts, unless jurisdiction is apparent on the record, is applicable whether the judgment is for the plaintiff or defendant; and it has been held, in a case in Pennsylvania, that where the defendant recovered a verdict for five dollars and costs, on account of the absence of the plaintiff, that it was no bar to another action, as the former verdict was equivalent only to a non-suit. Every one who brings an action is liable for the costs whether the court had or had no jurisdiction even if no benefit could be derived from a judgment, were one rendered.<sup>2</sup> Yet a party is not estopped from averring want of jurisdiction as a reason why he should not be bound by an adverse judgment on the merits of the question, nor from questioning the existence of jurisdiction in any subsequent proceeding in which the judgment is pleaded or given in evidence.<sup>3</sup> Whenever facts appear which give jurisdiction, they may be disproved, and the proceedings avoided by parol evi-

71; *Yard v. Crammond*, 5 Rawle, 18; *Thompson v. Multonah*, 2 Oreg. 34; *Comstock v. Crawford*, 3 Wall. 396; *Long v. Burnett*, 13 Ia. 28; *McKenzie v. Ramsey*, 1 Bail. 457; *Hampton v. Hardin*, 88 N. C. 592; *Cumberland, &c. Co. v. Jeffries*, 27 Md. 526; *Burke v. Elliott*, 4 Ired. 355; *Ward v. State*, 40 Miss. 108; *Shaver v. Shell*, 24 Ark. 122; *Flittes v. Alfrey*, L. R. 10 C. P. 29; *Cemetery Co. v. People*, 92 Ill. 619; *Shoemaker v. Brown*, 10 Kas. 383; *Reed v. Sponable*, 66 N. C. 415; *Clark v. Thompson*, 47 Ill. 25; *McDonald v. Simcox*, 98 Pa. St. 619; *Tarbox v. Hays*, 6 Watts. 398; *Conover v. Musgrave*, 68 Ill. 160; *Wemberly v. Hunt*, 33 Ill. 172; *Williams v. Ball*, 52 Tex. 603; *Hauer's Appeal*, 5 W. & S. 493; *Sloan v. McKinstry*, 18 Pa. St.

190; *Billings v. Russell*, 23 Pa. St. 189; *London v. R. R.*, 88 N. C. 584; *Nav. Co. v. Green*, 3 Dev. 434; *Gianberry v. Moon*, 1 Dev. 456; *Barwick v. Wood*, 3 Jones L. 306; *Bell v. Raymond*, 18 Conn. 160; *Relyea v. Ramsey*, 2 Wend. 602; *Roosevelt v. Kellogg*, 20 Johns. 208; *Bernard v. Lynch*, 36 Cal. 135; *Gees v. Shannon*, 2 Watts. 71; *Dakin v. Hudson*, 6 Cow. 221; *Sheldon v. Wright*, 5 N. Y. 497; *Mitchell v. Hawley*, 4 Denio, 416; *Woodruff v. Cook*, 2 Ed. Ch. 262.

<sup>1</sup> *Bank v. Judson*, 8 N. Y. 254.

<sup>2</sup> *Beames v. Failey*, 1 Eng. C. L. 177; *Hunt v. Inhabitants*, 8 Met. 343; *McMahon v. Ins. Co.*, 3 Bosw. 644.

<sup>3</sup> *Reading v. Price*, 3 J. J. Marsh. 61; *State v. Beecher*, 25 Conn. 539.

dence.<sup>1</sup> But this is only applicable to those facts and averments on which the jurisdiction of the court depends, for as to all else the records of inferior as well as superior courts import absolute verity, and cannot be controverted.<sup>2</sup>

§ 354. All courts are limited to certain subjects of cognizance. Some to actions and prosecutions, civil and criminal, and to appellate and supervisory proceedings; some to only one of the branches, as to criminal matters, civil actions, or to certain particulars of each; some to matters in equity, or of an admiralty or military nature; and others to few matters of small consequence. Richardson, J.,<sup>3</sup> in a case reviewing many authorities on the question relating to limited jurisdiction and inferior courts, said: "It is true that courts of limited jurisdiction are like particular agents; we must see their authority before we regard their decisions as lawful; but, seeing it, we are to respect it, and their authority is not the less certain because specified and confined. The Supreme Court of the United States is one of particular and limited jurisdiction; and yet, though bound down by the Constitution to powers strictly delegated—although very confined in its objects—how sovereign and unrestrained is that court within its limits! It is even so with every court of particular and limited jurisdiction, and we require to see evidence of its authority, as much in the instance of the Supreme Court of the United States as in any other. The difference between these and courts of common law and general jurisdiction is, that the latter, as a general rule, have their judicial authority proven, *prima facie*, by the judicial act itself, which is *ipso facto* binding, until it appears negatively that the court

<sup>1</sup> Wheeler v. Raymond, 8 Cow. 311; Smith v. Fowle, 12 Wend. 9; Thomas v. Robinson, 3 Wend. 267; Cleveland v. Rogers, 7 Wend. 435; Sheldon v. Hopkins, 7 Wend. 435; Pelton v. Platner, 13 Ohio, 209; Foster v. Glazener, 27 Ala. 391; Gunn v. Howell, 27 Ala. 663; Shivers v. Wilson, 5 H. & J. 130; Thacher v. Powell, 6 Wheat. 119; Beal v. Smith, 14 Tex. 305; Shufeldt v. Buckley, 45 Ill. 223;

Draggou v. Graham, 9 Ind. 212, Cone v. Cotton, 3 Blackf. 85; Martin v. Kennard, 3 Blackf. 430; Grant v. Bledsoe, 21 Tex. 456; Walker v. Mosely, 5 Denio, 103; Denning v. Corwin, 11 Wend. 647; Borden v. Fitch, 15 Johns. 121.

<sup>2</sup> Gunn v. Howell, 35 Ala. 144; Wyatt v. Rambo, 29 Ala. 510, Gray v. McNeal, 12 Ga. 424.

<sup>3</sup> McKenzie v. Ramsey, 1 Bailey, (S. C.) 457.

has not the power. This is, indeed, no more, in principle, than the distinction between all general and particular agents. The constitution affords an example of each. The general powers of the State legislature afford a striking illustration. Its legislative acts are *ipso facto* binding, unless we can find in the constitution a direct negative and unavoidable estoppel. And why is this the case? Because it has the legislative power, with only a few particular restrictions. At the same time another great department of the government, the executive, created, too, by the constitution, is no more than a particular agent, under a delegation of limited powers, to which the governor must always look before he acts, not to see if the executive power has been taken away, but if any power has been given him in this particular case to enable him to act at all. And why these distinctions between these great departments? Because the framers of the constitution saw fit to delegate to the executive particular powers only, and not general powers with restrictions. It is the same with all courts of limited and particular jurisdiction. They are strictly confined to the powers given; but we are not, therefore, to seek to curtail their powers. Such courts must not assume constructive powers (that is), powers not literally given, or not necessarily consequent upon those so given."

§ 355. In a question as to the validity of a decree of a county, probate, surrogate, orphan's court, or by whatever name known, authorizing the sale of the land of a deceased debtor by his administrator, the law is, "that where a decree is an adjudication upon all the facts necessary to give jurisdiction, whether they existed or not, is immaterial if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having the power to make the decree, it can be impeached only by fraud in the party who obtains it.<sup>1</sup> A purchaser under it is not bound to look

<sup>1</sup> Grignon v. Astor, 2 How. 319; Rex v. Carlisle, 2 B. & A. 367; Molins v. Werly, 1 Lev. 76; Bole v. Green, 1 Lev. 309; Baiosse v. Carrington, Cro. Jac. 244; Kempe v. Kennedy, 5 Cranch, 173; U. S. v. Arredondo, 6 Pet. 728; Thompson v. Tollmie, 2 Pet. 157; U. S. v. Nourse, 9

beyond the decree; if there is error in it of the most palpable kind; if the court which rendered it has, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are well settled as to all courts of record which have an original general jurisdiction over any particular subjects; they are not courts of special or limited jurisdiction; they are not inferior courts in the technical sense of the term, because an appeal lies from their decisions. That applies to courts of special and limited jurisdiction, which are created on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction. They have power to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as in civil causes, unless reviewed on error or on appeal.

§ 356. The true line between courts whose decisions are conclusive, if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear upon their face, is this: a court which is competent by its constitution to decide upon its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the

Pet. 27; Voorhees v. Bank, 10 Pet. 472; Comstock v. Crawford, 3 Wall. 403, Jackson v. Robinson, 4 Wend. 440, Sitzman v. Pacquette, 13 Wis. 291; Baily v. Scott, 13 Wis. 620; Arnold v. Booth, 14 Wis. 180; Allie v. Schmitz, 17 Wis. 172; Reynolds v. Schmidt, 20 Wis. 374; Board v. R. R. Co., 24 Wis. 131; Howe v. McGivern, 25 Wis. 525; Blodgett v. Hitt, 29 Wis. 170; Farrington v. Wilson, 29 Wis. 334; State v. Cary, 33 Wis. 103; Hauser v. State, 33 Wis. 678; McPherson v. Cuniff, 11 Serg. & R. 426, Kellogg v. Johnson, 38 Conn. 269; Gould v. Stanton, 17 Conn. 388;

Watson v. Hutto, 27 Ala. 513; Springer's Appeal, 29 Pa. St. 208; Walker v. Bradbury, 15 Me. 207, Bent v. Weeks, 44 Me. 45; Danforth v. Smith, 23 Vt. 247; Sheldon v. Bush, 1 Conn. 170; Gates v. Treat, 17 Conn. 392; Randolph v. Doss, 4 Miss. 205; Wheelock v. Hastings, 4 Met. 504; Peters v. Peters, 8 Cush. 529; Loring v. Steineman, 1 Met. 204; Abbott v. Bradstreet, 3 Allen, 587; Waters v. Stickney, 13 Allen, 1; Emery v. Hildreth, 2 Gray, 228; Whitehead v. Mallory, 4 Gray, 180; Crippen v. Dexter, 13 Gray, 330; Luchterhand v. Sears, 108 Mass. 552.

facts and evidence on which it is rendered, and whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment, save by appellate power. A court which is so constituted that its judgment can be looked at through the facts and evidence which are necessary to sustain it; whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description. Every requisite for either must appear on the face of their proceedings, or they are nullities." "The only question would seem to be whether the subject matter was within the jurisdiction of the court; if it was, if the jurisdiction of the court extended over that class of cases, it was the province of the court to determine for itself whether the particular case was one within its jurisdiction. The Circuit Court is a court of general jurisdiction, taking cognizance of all actions at law between individuals, with authority to pronounce judgments and issue executions for their enforcement.<sup>1</sup> This jurisdiction need not appear on the face of the proceedings, as in the case of courts of limited and restricted jurisdiction; where its jurisdiction is questioned, it must decide the question itself; nor is it bound to set forth on the record the facts upon which its jurisdiction depends."

§ 357. "Whenever the subject matter of the controversy is an action at law between individuals, the jurisdiction is presumed from the fact that it has pronounced judgment, and the correctness of that judgment cannot be inquired into only by some appellate tribunal. The execution which would issue on the judgment in the case under consideration, would not disclose to the officer the nature of the proceedings upon which the judgment was founded. There was no necessity to set forth in the judgment on what evidence it was rendered; and being a judgment for a pecuniary recovery, which the court had general jurisdiction to render, the sheriff would have been bound to execute it, and the execution would have been his justification." Then, citing the decision in the case of *Grignon v. Astor*, *supra*, he said, "Of that description is the Circuit Court of Virginia, and its decision in controversies at law is evidence of itself to show

<sup>1</sup> Cox v. Thomas, 9 Gratt. 323.

jurisdiction and its lawful exercise. The subject being within the jurisdiction of the court it is immaterial by what form it is exercised ; they do not affect the jurisdiction of the court. Thus it is said in the case of the Marshalsea, if the court of Common Pleas hold plea in an appeal of death and the defendant is attainted it is *coram non judice*. But if the same court in plea of debt award a *capias* against a duke, which by law does not lie against him, and that appear in the writ itself, yet as the court has jurisdiction of the cause the sheriff arresting by force of this writ is excused. So also, if the Court of Common Pleas hold plea in debt without original jurisdiction it is not void, for they are judges of those pleas, and it cannot be said the proceeding is *coram non judice*. So here the judges of the Circuit Court are judges of pleas against sheriffs whether carried on by action at common law or by notice under the statute, though in a given case they may err in determining on their jurisdiction." In the case of *Prigg v Adams*,<sup>1</sup> in an action for false imprisonment the officer justified under a *ca. sa.* on a judgment of the Court of Common Pleas upon a verdict of five shillings upon a cause of action arising in Bristol. The plaintiff replied, an act of Parliament creating a court in Bristol, and declaring that if any person brought any such action in any court at Westminster, and it appeared on trial to be under forty shillings, no judgment should be entered upon it, and if entered it should be void, yet the court held it only voidable and sustained the plea. The principle of that case is decisive of this. There although the act of Parliament declared the judgment void, yet as a court having jurisdiction of the subject matter had rendered it, though the error appeared on its face, it could be corrected only in an appellate tribunal. The case of *Prigg v Adams*, is cited and relied on in *Fisher v. Tucker*,<sup>2</sup> and the same principle was asserted in that case, the court holding that as the general court had jurisdiction to grant letters of administration, although the state of facts was not such as to give the court jurisdiction to grant administration in that particular case, yet the grant was not void but only a voidable act. The justice of this doctrine and its advantages in giving certainty and conclusiveness to judicial determinations of

<sup>1</sup> 2 Salk R. 674.<sup>2</sup> 9 Leigh, 119.

tribunals must, from the reasoning in the two decisions herein quoted, be clearly apparent. There is nothing absurd or inconsistent in holding that tribunals of limited jurisdiction shall determine whether matters brought before it are within the exercise of its powers."

§ 358. There are but few older principles of law that are well settled and established or that are supported by a greater weight of authority and reason than that which holds that the proceedings of superior courts must be presumed to be correct unless manifestly erroneous, and cannot be controverted or convicted of error by extrinsic evidence, so that even when a judgment is obtained by fraud the only remedy open to the injured party is by bill in equity or an application to the court by which it was rendered.<sup>9</sup> A stranger whose interests are prejudiced may however prove that the judgment was the result of fraud and collusion between the parties.<sup>1</sup> Where a judgment in a personal action

<sup>1</sup> *Atkinson v. Allen*, 12 Vt. 617; *Ordinary v. Wallace*, 2 Rich. 460; *De Armond v. Adams*, 25 Ind. 455; *Hacket v. Manlove*, 14 Cal. 85; *Hall v. Hamlin*, 2 Watts, 354; *Crosby v. Long*, 12 East, 409; *Lloyd v. Maddox*, Moo. 917; *Ins. Co. v. Wilson*, 34 N. Y. 281; *Yaple v. Titus*, 41 Pa. St. 195; *Campbell v. Strong*, 1 Hemp. 265; *Ramsley v. Stott*, 26 Pa. St. 126; *Hollister v. Abbott*, 31 N. H. 442; *Sidenspark v. Sidenspark*, 52 Me. 481; *Wall v. Wall*, 28 Miss. 409; *Hartman v. Ogborn*, 54 Pa. St. 120; *Vose v. Morton*, 4 Cush. 27; *Fisk v. Miller*, 20 Tex. 579; *Kelly v. Mize*, 3 Sneed, 59; *Leonard v. Bryant*, 11 Met. 370; *Griswold v. Stewart*, 4 Cow. 458.

<sup>2</sup> *Parkhurst v. Sumner*, 23 Vt. 538; *Downs v. Fuller*, 2 Met. 135; *R. R. v. Sparhawk*, 1 Allen, 448; *Mason v. Messenger*, 17 Iowa, 261; *People v. Downing*, 4 Sand. 189; *Smith v. Smith*, 22 Iowa, 516; *Boyd v. Caldwell*, 4 Rich. 117; *Field v. Sanderson*, 34 Mo. 542; *Bank v.*

*Stevens*, 1 Ohio S. 233; *Moody v. Harper*, 38 Miss. 599; *Blanchard v. Brown*, 3 Wall. 245; *Moore v. Parker*, 25 Iowa, 355; *Ross v. Wood*, 15 N. Y. Supreme Court, 185; *Carpenter v. Oakland*, 30 Cal. 439; *Clark v. McComman*, 7 W. & S. 469; *Brown v. Trulock*, 4 Blackf. 429; *Smith v. Pomeroy*, 2 Dill. 414; *Arnold v. Nye*, 23 Mich. 286; *Kelsey v. Wiley*, 10 Ga. 371; *Skilman v. Greenwood*, 15 Minn. 102; *Bush v. Lindsey*, 24 Ga. 245; *Hahn v. Kelly*, 34 Cal. 391; *Calkins v. Parker*, 21 Barb. 275; *Prince v. Griffin*, 16 Iowa, 552; *Grignon v. Astor*, 2 How. 319; *Cox v. Thomas*, 9 Gratt. 323; *Wells v. Waterhouse*, 23 Me. 131; *Ely v. Fallman*, 14 Wis. 28; *Potter v. Bank*, 28 N. Y. 656; *Dean v. Thatcher*, 32 N. J. L. 470; *Pillsbury v. Dugan*, 9 Ohio, 117; *Field v. Flanders*, 40 Ill. 470; *Withers v. Patterson*, 27 Tex. 491; *Holmes v. Campbell*, 12 Minn. 221; *Spaulding v. Baldwin*, 31 Ind. 376; *Evans v. Ashby*, 22 Ind. 15; *Butcher v. Bank*, 2 Kan. 70; *Reynolds v. Stansberry*, 20 Ohio, 344.

whether rendered on default or after contestation, is not liable to either of these objections, it is conclusive as to the relation of debtor and creditor between the parties and the amount of the indebtedness; and it cannot be collaterally impeached by third parties in a subsequent suit, when such relation and indebtedness are called in question. But the fraud must be clearly established.<sup>1</sup> This principle is applicable in every instance within the authority of a court which decides without regard to the nature or mode of decision,<sup>2</sup> whether the suit be *in rem* or *in personam*, or be like a foreign attachment or mixed proceeding, although when the service is solely upon lands or chattels the estoppel is ordinarily limited to the attached property, and does not bind the defendant personally, unless personally served with process.<sup>3</sup>

§ 359. In regard to the regularity of judicial proceedings the general rule is that in courts of general jurisdiction every intendment will be made to uphold them. Jurisdiction will therefore be presumed. "The presumption indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process. The settled rule of law is, that jurisdiction having attached in the original case, every thing done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud." The maxim "*Omnia*

<sup>1</sup> *Hulverson v. Hutchinson*, 39 Iowa, 316.

<sup>2</sup> *Ennis v. Smith*, 14 How. 400; *Fermor's Case*, 3 Coke, 777.

<sup>3</sup> *Voorhees v. Bank*, 10 Pet. 449; *McCarthy v. Marsh*, 5 N. Y. 263.

<sup>4</sup> *Kempe v. Kennedy*, 5 Cranch, 173; *Thompson v. Tolmie*, 2 Pet. 157; *Voorhees v. Bank*, 10 Pet. 449; *Grignon v. Astor*, 2 How. 319; *Florentine v. Barton*, 2 Wall. 210; *McGoon v. Scales*, 9 Wall. 23; *Glover v. Holman*, 3 Heisk. 519; *West v. Williamson*, 1 Swan, 277; *Cooper v. Reynolds*, 10 Wall. 308; *Cornett v. Williams*, 20 Wall. 226; *White v. Crow*, 101 U. S. 183; *Merritt v. Baldwin*, 6 Wis. 439;

*Outlaw v. Davis*, 27 Ill. 407; *Thorp v. Commonwealth*, 3 Met. Ky. 411; *Harris v. McClanahan*, 11 Lea, 181; *Commonwealth v. Balkom*, 3 Pick. 281; *Davis v. State*, 17 Ala. 354; *State v. Farish*, 23 Miss. 483; *Blake v. Manf'g Co.*, 77 N. Y. 626; *Wade v. Hancock*, 76 Va. 620; *Maukel v. Evans*, 47 Ind. 326; *Butcher v. Bank*, 2 Kas. 80; *State v. Lewis*, 22 N. J. L. 264; *R. R. Co. v. Ramsey*, 23 Wall. 322; *Brien v. Hart*, 6 Humph. 131; *Gulpin v. Page*, 18 Wall. 364; *Redmond v. Anderson*, 18 Ark. 449; *Hopper v. Fisher*, 2 Head, 258; *Harvey v. Tyler*, 2 Wall. 332; *Wimberly v. Hurst*, 33 Ill. 166; *Cloud v. El*

*praesumuntur rite et solemniter esse actu*" stands for evidence of the fact, in the absence of other evidence, or unless the contrary be shown (*stabit praesumptio donec probitur in contrariam*) for the presumptions are in favor of the regularity of all judicial proceedings. A forcible illustration of this rule is seen in those cases where judgments of inferior tribunals are sought to be set aside on review or appeal.<sup>1</sup>

Dorado, 12 Cal. 128; Watkins, in re, 3 Pet. 193; Breston v. Clark, 9 Ga. 246; Blakely v. Calder, 1 Ind. 621; Chase v. Christianson, 41 Cal. 253; R. R. Co. v. Sparhawk, 1 Allen, 448; Collartreau v. Ingout, 14 La. 623; Balgian v. Cooke, 19 Md. 375; Savage v. Hussey, 3 Jones L. 155; Hathaway v. Henningway, 20 Conn. 190; Feaster v. Fleming, 56 Ill. 457; Fleming v. Johnson, 26 Ala. 422; Hunt v. Hunt, 72 N. Y. 217.

<sup>1</sup> Stiles v. Batkin, 30 Iowa, 60; Henry v. Beers, 48 Mo. 366; Ray v. Rowley, 1 Hun, 614; Sheldon v. Wright, 7 Barb. 39; Slicer v. Bank, 16 How. 571; State v. Hinchman, 27 Pa. St. 479; Morris v. Gentry, 89 N. C. 248; Commonwealth v. Brown, 123 Mass. 410; Hudson v. Messick, 1 Houst. 275; Slade v. Minor, 2 Cranch C. C. 139; Smith v. Williamson, 11 N. J. L. 313; Van Devere v. Gaston, 25 N. J. L. 615; Grinstead v. Foute, 26 Miss. 476; Reynolds v. Nelson, 41 Miss. 83; Brown v. Connolly, 21 Ark. 140; Gray v. Cruise, 36 Ala. 559; Sumner v. Cook, 12 Kas. 162; Addington v. Allen, 11 Wend. 374; Foot v. Stevens, 17 Wend. 486; Austin v. Austin, 50 Me. 74; Brown v. Wood, 17 Mass. 68; Apthorp v. North, 14 Mass. 167; Commonwealth v. Balcolm, 3 Pick. 281; Letcher v. Kennedy, 3 J. J. Marsh. 701; Vincent v. Eaves, 1 Met. 247; McNorton v. Akers, 24 Iowa, 369; State v. Williamson, 57 Mo. 192; Wickham v. Page, 49 Mo. 527; Morgan v. State, 12 Ind. 440;

Kelly v. Garner, 13 Ind. 400; Owens v. State, 25 Ind. 371; Brackenridge v. Dawson, 7 Ind. 383; Doty v. State, 7 Blackf. 529; Brown v. Gill, 49 Ga. 549; Morris v. Ogle, 59 Ga. 592; Sidwell v. Worthington, 8 Dana, 74; Rosenthal v. Remick, 41 Ill. 202; Moore v. Neil, 39 Ill. 256; Tibbs v. Allen, 27 Ill. 119; Callison v. Autry, 4 Tex. 371; Frosh v. Holmes, 8 Tex. 29; Sandford v. Sandford, 28 Conn. 6; Beale v. Commonwealth, 25 Pa. St. 11; Williamson v. Fox, 38 Pa. St. 214; Garrett v. Dillsberry, 78 Pa. St. 467; Cochran v. Arnold, 58 Pa. St. 399; Cromelien v. Brink, 29 Pa. St. 522; Bunker v. Rand, 19 Wis. 254; Drake v. Duberick, 45 Cal. 455; Rice v. Cunningham, 29 Cal. 492; People v. Garcia, 25 Cal. 531; Stearns v. Stearns, 32 Vt. 678; Voorhees v. Bank, 10 Pet. 449; Erwin v. Lowry, 7 How. 181; Reedy v. Scott, 23 Wall. 352; Florentine v. Barton, 2 Wall. 210; Cofield v. McClelland, 16 Wall. 331; Legree v. Thomas, 3 Blatchf. 111; Sprague v. Lithberry, 4 McLean, 442; Minor v. Bank, 1 Pet. 41; Dobson v. Campbell, 1 Sumn. 319; Gossett v. Howard, 10 Q. B. 441; R. v. Lyme Regis, 1 Dougl. 159; R. v. Buckley, 7 East, 45; R. v. Bowen, 13 Q. B. 790; R. v. Waters, 1 Den. C. C. 356; R. v. Carlisle, 2 B. & A. 367; R. v. Whitney, 5 A. & E. 191; R. v. Whiston, 4 A. & E. 607; Caunce v. Rigby, 3 M. & W. 68; Parsons v. Lloyd, 3 Wils. 341; Lee v. Johnston L. R. 1 H. L. 426,

§ 360. Whenever a judgment is rendered without authority or jurisdiction, or what is virtually the same thing, which is in excess of and lies beyond the general jurisdiction which renders it, it is *coram non judice* and necessarily void, and may be shown to be so in the course of any subsequent or collateral proceeding, want of jurisdiction renders the judgment of a court a nullity and unavailable for any purpose.<sup>1</sup> This applies to all tribunals, but if the facts conferring jurisdiction have been litigated and passed upon by the court, the regularity of the proceedings will not be inquired into collaterally.<sup>2</sup> If the party defendant is not brought into court, nor in any manner served with process, there can be no valid judgment against him, and no record unless he appeared by attorney in the cause.

§ 361. The proceedings of all courts may be assailed in various ways for want of jurisdiction. When the question is raised in one form they may be held valid, whereas in another they may be held void or voidable,<sup>3</sup> valid to protect a person acting under them while unreversed to secure him a right or fix his title. They may serve him as a defense to an action, while they would be inefficient by way of securing a claim under them. They may protect some persons acting under them and be void as to others. They are most generally assailable under a writ of error or appeal. All jurisdictions are limited to persons, place

Reed v. Jackson, 1 East, 335; Ramsbottom v. Buckhurst, 2 M. & S. 567; Jackson v. Pesked, 1 M. & S. 237; Spiers v. Parker, 1 T. R. 141; Davis v. Black, 1 Q. B. 911; Harris v. Goodwin, 2 M. & S. 405; Powell v. Sonnett, 3 Bing. 381; Gibbs v. Pike, 9 M. & W. 351; Delamere v. Queen, L. R. 2 H. L. 419; Gladthorpe v. Hardman, 13 M. & W. 337; Bastard v. Trutch, 3 A. & E. 451; Smith v. Keating, 6 C. B. 136; Kidgill v. Moore, 9 C. B. 364.

<sup>1</sup> Galpin v. Page, 18 Wall. 350; Starbuck v. Murray, 5 Wend. 148; Williamson v. Berry, 8 How. 495; Thompson v. Whitman, 18 Wall. 457.

<sup>2</sup> Hudson v. Guestier, 6 Cr. 281; Thompson v. Tolmie, 2 Pet. 157; Watkins, in re, 3 Pet. 193; Grignon v. Astor, 2 How. 319; U. S. v. Arredondo, 6 Pet. 691; Rhode Island v. Mass., 12 Pet. 657; Griffith v. Bogert, 18 How. 158; Florentine v. Barton, 2 Wall. 210; Comstock v. Crawford, 3 Wall. 396; Jackson v. Crawford, 12 Wend. 533; Wright v. Douglass, 10 Barb. 97; Fisher v. Bassett, 9 Leigh, 119; Dyckman v. Mayor, 5 N. Y. 434; Blein v. Campbell, 14 Johns. 432; Offutt v. Offutt, 2 H. & G. 178; Schindel v. Surnam, 13 Md. 310; Mercier v. Chase, 9 Allen, 242.

<sup>3</sup> Wade v. Hancock, 76 Va. 620; Wharton v. Moranque, 62 Ala. 201.

and things. The court must have jurisdiction of the process, and this is peculiarly applicable to all inferior jurisdictions.

§ 362. While superior courts are not limited in their powers nor prevented from rendering final and conclusive judgments in regard to the determination of controversies within reach of their powers, and unless essentially and manifestly beyond them. Where a court of general jurisdiction has proceeded to adjudicate in a cause, it will be presumed that the court had evidence that there was such service or appearance as conferred jurisdiction of the person. The question is primary, and must be first determined, but the presumption may be rebutted. If the same record shows insufficient service, and it fails to show the court otherwise acquired jurisdiction, then the presumption is rebutted, and it will be held the court acted on insufficient service. When the return appears in the record, and there is no finding of the court from which it may be inferred that the court otherwise acquired jurisdiction, it will be held the court acted on the service appearing in the record. The rule is essentially different in regard to courts of limited and inferior jurisdictions. Their judgments and decrees are final only to matters within their jurisdiction, and are final on the question of jurisdiction only so far as the question of jurisdiction is involved in the merits of the matter in litigation and determined, and a recital in the record and proceedings of such a tribunal, if the necessary facts to give them jurisdiction is *prima facie* evidence, but extrinsic and parol evidence may be used to rebut that presumption.<sup>1</sup> Thus where an attachment was levied upon certain goods and judgment rendered, Justice Miller, in 5 Wallace decided, that a party could at any time show that the goods were not liable to attachment and were beyond the jurisdiction of the court notwithstanding the record stated that they were; but this rule is applicable only to those facts and averments on which the jurisdiction of the court depends; as to all else, if jurisdiction is shown, the records import absolute verity and cannot be contradicted. Thus a recital that a trial by jury was waived,<sup>2</sup> or a motion for a new trial was not made in due time, is conclusive

<sup>1</sup> Belden v. Moeker, 2 Lans. 470.      <sup>2</sup> Stiles v. Balkin, 30 Iowa, 60.

on appeal.<sup>1</sup> When the powers of an inferior court are limited to causes of action arising within a particular locality, or relating to property of a specific nature, the judgments and adjudications of such tribunals may be set aside subsequently, by proof that they have exceeded their limits, no matter how conclusive their determinations may be in other matters,<sup>2</sup> and the same rule applies to courts whose jurisdiction is confined to one class of persons when they attempt to exercise it over another. The doctrine may be thus stated :<sup>3</sup> 1st. That where a judicial tribunal has general jurisdiction of the subject matter in controversy or investigation, and the special facts which give it the right to act in a particular case are averred and not controverted, upon notice to all proper parties, jurisdiction is acquired, and cannot be assailed in any collateral proceedings.<sup>4</sup> 2d. Where the judicial tribunal has not general jurisdiction of the subject matter under any circumstances, no averment can supply the defect, no amount of proof can alter the case, no consent can confer jurisdiction. But where the judicial tribunal has not general jurisdiction of the subject matter, but may exercise it under a particular state of facts, these facts must be specially averred and established, and, when so established on a hearing of all proper parties, cannot be im-

<sup>1</sup> *Henry v. Beers*, 48 Mo. 366.

<sup>2</sup> *Williams v. Wheeler*, 28 Barb. 669; *Harrriott v. Van Cott*, 5 Hill, 285; *Borie v. Miller*, 40 Barb. 661.

<sup>3</sup> *Bumstead v. Bumstead*, 31 Barb. 661.

<sup>4</sup> *McCormick v. Sullivant*, 10 Wheat. 192; *Moise v. Presley*, 25 N. H. 299; *Caulton v. Ins Co.*, 35 N. H. 163; *Hartman v. Ogborn*, 54 Pa. St. 120; *Clark v. Bryan*, 16 Md. 171; *Simmons v. McKay*, 5 Bush, 25; *Cullen v. Ellison*, 13 Ohio S. 446; *Moffitt v. Moffitt*, 69 Ill. 641; *Rice v. Brown*, 77 Ill. 549; *McCauley v. Fulton*, 44 Cal. 355; *Adams v. Balch*, 5 Me. 188; *Clayes v. v. Sherwin*, 12 Mod. 343; *Foster v. Shaw*, 7 S. & R. 156; *Barr v. Gratz*, 4 Wheat. 213; *Witmer v. Schattner*, 2 Rawle, 359; *Jackson v. Wood*, 3 Wend. 27; *Fowler v. Savage*, 3 Conn.

90 *Whitwell v. Barbier*, 7 Cal. 54; *Sharp v. Brunnings*, 35 Cal. 529; *Mitchell v. Meuley*, 32 Tex. 460; *Hahn v. Kelly*, 34 Cal. 391; *Whorton v. Moragne*, 62 Ala. 201; *Lawler v. White*, 27 Tex. 250; *Coit v. Haven*, 30 Conn. 190; *Pratt v. Dow*, 56 Me. 81; *Granger v. Clark*, 22 Me. 128; *Yaple v. Titus*, 41 Pa. St. 202; *Shawhan v. Loffer*, 24 Iowa, 217; *Cook v. Darling*, 15 Pick. 333; *Stephenson v. Newcomb*, 5 Harr. 150; *Gratts v. Dexter*, 8 Ala. 767; *Cox v. Thomas*, 9 Gratt. 323; *Finneran v. Leonard*, 7 Allen, 54; *Blythe v. Richards*, 10 S. & R. 260; *Carpenter v. Oakland*, 30 Cal. 439; *Smith v. Smith*, 23 Iowa, 516; *People v. Downing*, 4 Sandf. 189; *Richards v. Kilf*, 8 Ohio S. 586; *Ward v. Barber*, 1 E. D. Smith. 423; *St. Albans v. Bush*, 4 Vt. 58.

peached in any collateral proceedings.<sup>1</sup> When a superior or inferior court has jurisdiction over the cause, its judgment cannot be set aside by proof that the proper steps were not taken to render it binding upon the parties, by the service of process or publication, if it appear that the question, whether the writ was duly served or published, was considered and decided when the judgment was rendered, although on insufficient evidence, and without actual notice to the party whose rights were affected by the decision.

§ 363. If the record of a domestic court of general jurisdiction declare notice to have been given, such declaration cannot be contradicted by plea or proof, because, for reasons of public policy, the records of such courts are presumed to speak the truth.<sup>2</sup> The recital of jurisdiction in the record cannot be controverted. If this could be contradicted, there is no matter in the record that could not be contradicted in a collateral action. The rule is, that a domestic judgment of a court of general jurisdiction upon a subject matter within the ordinary scope of its powers and proceedings is entitled to such absolute verity, that in a collateral action, even where the record is silent as to notice, the presumption, when not contradicted by the record itself, that the court had jurisdiction of the person also, is so conclusive that evidence *aliunde* will not be admitted to contradict it.<sup>3</sup>

<sup>1</sup> Anderson v. Binford, 58 Tenn. 810; Sheldon v. Wright, 5 N. Y. 497; Fitzhugh v. McPherson, 9 G. & J. 51.

<sup>2</sup> Fair v. Ladd, 37 Vt. 156; Eastman v. Waterman, 26 Vt. 494; Aultman v. McLean, 27 Iowa, 129; Selin v. Snyder, 7 S. & R. 166; Lyles v. Robinson, 1 Bailey, 25; R. R. Co. v. Weeks, 52 Me. 518; Hotchkiss v. Cutting, 14 Minn. 537; Segee v. Thomas, 3 Blatch. 11; Morgan v. Burnett, 18 Ohio, 335; Dequindre v. Williams, 31 Ind. 444; Harris v. McClanahan, 11 Lea, 181; Hunter v. Stoneburner, 92 Ill. 75.

<sup>3</sup> Lawler v. White, 27 Tex. 250; Guilford v. Love, 49 Tex. 715; Hahn

v. Kelley, 34 Cal. 391; Westervelt v. Lewis, 2 McL. 511; Riley v. Waugh, 8 Cush. 220; State v. Borden, 11 Ark. 519; Delaney v. Gault, 30 Pa. St. 63; McCreery v. Portion, 35 Tex. 641; Miller v. Ewing, 16 Miss. 421; Wright v. Weissinger, 13 Miss. 210; Riggs v. Collins, 2 Biss. 268; Peyroux v. Peyroux, 24 La. Ann. 175; Fitch v. Boyer, 51 Tex. 336; Galpin v. Page, 18 Wall. 350; Sharp v. Bunnings, 35 Cal. 528; Mitchell v. Menley, 32 Tex. 400; Coit v. Haven, 30 Conn. 190; Pratt v. Dow, 56 Me. 81; Granger v. Clark, 22 Me. 128; Yaple v. Titus, 41 Pa. St. 202; Shawhan v. Loffer, 24 Ia. 217; Cook v. Darling, 18 Pick. 393; Stephenson v. Newcomb, 5 Harr. 150; Crafts v.

This is a different question from that in which the defect of jurisdiction over the person is sought to be shown on error or appeal.<sup>1</sup>

§ 364. Whenever the question of jurisdiction is one of fact, and is decided by the court whose proceedings are in question, the decision will be final, whether the question arise on a writ of error or in a collateral action.<sup>2</sup> "The sufficiency of the service being a matter within the jurisdiction of the court, its adjudication upon that matter cannot be questioned in a collateral proceed-

Dexter, 8 Ala. 767; Cox v. Thomas, 9 Gratt. 323; Finneran v. Leonard, 7 Allen, 54; Blythe v. Richards, 10 S. & R. 260; Richards v. Kilf, 8 Ohio S. 586; Ward v. Barber, 1 E. D. Smith, 423; St. Albans v. Bush, 4 Vt. 58; McCormick v. Webster, 83 Ind. 83; Wade v. Hancock, 76 Va. 620; Crane v. Kimmer, 77 Ind. 215; Turrell v. Warren, 25 Minn. 9; Harris v. McClanahan, 11 Lea, 181; McAlpine v. Sweetzer, 76 Ind. 78; Dwiggins v. Cook, 71 Ind. 579; Cavanagh v. Smith, 84 Ind. 380; R. R. Co. v. Burress, 82 Ind. 83; Waltz v. Bonoway, 25 Ind. 380; Stout v. Woods, 79 Ind. 108; Homer v. Doe, 1 Ind. 13; Hawkins v. Hawkins, 28 Ind. 63; Hume v. Conduitt, 76 Ind. 598; Gerard v. Johnson, 12 Ind. 636; Muncey v. Joest, 74 Ind. 409; Gale v. Parks, 58 Ind. 117; Coan v. Clow, 83 Ind. 417.

<sup>1</sup> Blossom v. Latchford, 17 Tex. 647; Burditt v. Howth, 45 Tex. 466.

<sup>2</sup> Woodbury v. Maguire, 42 Iowa, 339; Ins. Co. v. Highsmith, 44 Iowa, 330; Brittain v. Kinnard, 1 B. & B. 432; Betts v. Bagley, 12 Pick. 572; Steele v. Smith, 7 L. R. 461; Otis v. Rio Grande, 1 Woods, 279; Botsford v. O'Connor, 57 Ill. 72; Latrielle v. Douleque, 35 Mo. 233; Russell v. Baptist Union, 73 Ill. 337; Davis v. Dresback, 81 Ill. 393; Searle v. Galbraith, 71 Ill. 269; Todd v. Crumb, 5 McLean, 172; Johnson v. Kerkhoff, 35

Mo. 291; Morrow v. Weed, 4 Iowa, 88; Lyon v. Vanatta, 35 Iowa, 525; Shawham v. Loffer, 24 Iowa, 217; Bowman v. Sanborn, 25 N. H. 87; Vassault v. Austin, 36 Cal. 691; Smith v. Wood, 37 Tex. 616; Betts v. Bagley, 12 Pick. 572; Martin v. Mott, 12 Wheat. 19; Vanderhayden v. Young, 11 Johns. 150; Wanzer v. Howland, 10 Wis. 16; Angel v. Robbins, 4 R. I. 493; Dyckman v. Mayor, 5 N. Y. 434; Agry v. Betts, 12 Me. 415; Reddick v. Bank, 27 Ill. 145; Miller v. Handy, 40 Ill. 448; Banks v. Banks, 31 Ill. 162; Russell v. Brown, 41 Ill. 183; Hahn v. Kelly, 34 Cal. 391; Quivey v. Baker, 37 Cal. 465; Timmerman v. Phelps, 27 Ill. 496; Reilly v. Lancaster, 39 Cal. 354; Rivard v. Gardiner, 39 Ill. 125; Low v. Dore, 32 Me. 27; Moore v. Neil, 39 Ill. 256; Waterhouse v. Cousins, 40 Me. 333; Lewis v. Dutton, 8 How. P. 103; Stoddard v. Johnson, 75 Ind. 20; Riley v. Waugh, 8 Cush. 230, R. R. Co. v. Evansville, 15 Ind. 395; Cooper v. Sunderland, 3 Iowa, 114; Vale v. Owen, 19 Barb. 22; Dougherty v. McManus, 36 Iowa, 657; Shea v. Quintin, 30 Iowa, 58; Ballenger v. Tarbell, 16 Iowa, 491; Moody v. Taylor, 13 Iowa, 71; Baker v. Chaplain, 12 Iowa, 204; Lees v. Wetmore, 58 Iowa, 170; Pursley v. Hayes, 23 Iowa, 11; Read v. Howe, 39 Iowa, 553; Tharp v. Brenneman, 41 Iowa, 251; Harris v. McClanahan, 11 Lea, 181.

ing, but must be regarded as conclusive." As we have seen, the effect of a judgment of a superior court, acting within the scope of its powers, it must be understood that when they exercise a special or statutory authority, their proceedings stand on the same footing with those of courts of limited and inferior jurisdiction, and are null and void unless they strictly pursue the authority on which they are founded. "In exercising powers which do not belong to a court of general jurisdiction, the extent of the authority, the conditions of its exercise, depends on the nature of it, the terms in which it is conferred, and not on the rank and position of the persons by whom it is to be exercised. A limited power will be not less strictly construed because those on whom it is bestowed are intrusted with other and more general powers." When the proceedings are taken by an inferior court, or a court of general jurisdiction has special and summary powers, wholly derived from statute, and not according to the course of the common law, and which do not belong to it as a court of general jurisdiction, its judgments are regarded and treated like those of courts of limited and inferior jurisdiction, and everything necessary to give jurisdiction must appear by the record; everything will be presumed to be beyond the jurisdiction which the record does not show to be within it.<sup>2</sup>

<sup>1</sup> Denning v. Corwin, 11 Wend. 647; Jackson v. Estey, 7 Wend. 148; Sharp v. Speir, 4 Hill, 76; Eaton v. Badger, 33 N. H. 238; Mount Morris Square, in re, 2 Hill, 14; Williamson v. Berry, 8 How. 495; Williamson v. Ball, 8 How. 566; Flatbush Avenue, in re, 1 Barb. 289; Forest v. Commonwealth, 33 Pa. St. 338; Owen v. Jordan, 27 Ala. 663; Foster v. Glazener, 27 Ala. 391; Eastman v. Jones, 2 Ga. 493; Morse v. Presby, 25 N. H. 299; Colton v. Ins. Co., 35 N. H. 163; Anderson v. Commissioners, 12 Ohio S. 636; Doolittle v. Railroad Co., 14 Ill. 381; People v. Williamson, 13 Ill. 660; Peak v. Boston, 8 Pick. 218; Cooper v. Sunderland, 3 Iowa, 114; Gray v. Rescille, 4 Wis. 59; Maskett v. Drummond, 10 B. & C. 153; Christie v.

Unwin, 11 A. & E. 373; Branker v. Molyneux, 4 M. & G. 226; Boswell's Les-ees v. Otis, 9 How. 336; Thatcher v. Powell, 6 Wheat. 119; Mayhew v. Davis, 4 McLean, 213; Embury v. Conner, 3 N. Y. 511; Striker v. Kelly, 7 Hill, 11; Fisk v. Anderson, 33 Barb. 71; Dyckman v. Mayor, 3 N. Y. 404; Ranson v. Williams, 2 Wall. 313; Harris v. Colquitt, 44 Ga. 663.

<sup>2</sup> Pulaski Co. v. Stuart, 23 Gratt. 872; Carlton v. Ins. Co., 35 N. H. 163; Harris v. Hardeman, 14 How. 334; Huntington v. Charlotte, 15 Vt. 46; Galpin v. Page, 18 Wall. 350; Kempe v. Kennedy, 5 Cranch, 173; Jackson v. Bridge Co., 34 Conn. 266; Pelton v. Palmer, 13 Ohio, 209; Goulding v. Clark, 34 N. H. 148; Reg. v. Totness, 11 Q. B. 80; Dempster v. Parnell, 4 Scrut

§ 365. There is this distinction between a lack of jurisdiction and an irregularity in obtaining jurisdiction, or, as tersely stated, between a case where there is no service, and one in which the service is defective or irregular. "In the first case, the court acquires no jurisdiction, and its judgment is void; in the other case, if the court to which the process is returnable adjudges the service to be sufficient, and renders judgment thereon, such judgment is not void, but only subject to be set aside by the court which gave it, upon seasonable and proper application, or reversed upon appeal."<sup>1</sup> The rule, therefore, deducible from the authorities may be thus stated: when jurisdiction is acquired, no irregularity in the mode of exercising it can affect the judgment when collaterally attacked; while the errors and irregularities may be so glaring as to cause an appellate tribunal to reverse or set aside the judgment, every tribunal, except one having supervisory powers by writ of error or appeal, must treat such judgment as absolute verity.

§ 366. From the authorities cited in the preceding sections, it may be said that it is a well-settled rule, and one which courts have deviated from less than almost any other, "That a judgment of a court having jurisdiction of both the subject-matter and the parties, however erroneous it may be, is a valid, binding, and conclusive judgment as to the matter in controversy upon the parties thereto, and to those claiming under them, and cannot be attacked or impeached in a collateral proceeding."<sup>2</sup> This rule, with the excep-

N. R. 30; Moore v. Presby, 25 N. H. 299; Swain v. Chase, 12 Cal. 288; Bosworth v. Vandewalker, 53 N. Y. 597; Embury v. Conner, 3 N. Y. 511; Kirk v. Inhabitants, 7 B. & C. 785; Graham v. Whitely, 26 N. J. L. 262; Tomfeit v. Lithgow, 1 Bush, 176; Jordan v. Goblin, 12 Cal. 100; Ricketson v. Richardson, 26 Cal. 149; McMinn v. Wheeland, 27 Cal. 300.

<sup>1</sup> Isaacs v. Price, 2 Dillon C. C. 351; Whitwell v. Barbier, 7 Cal. 54; Dorente v. Sullivan, 7 Cal. 279; Smith v. Bradley, 14 Miss. 485; Mooney

v. Mass. 22 Ia. 380; Peck v. Strauss 33 Cal. 678; Myers v. Overton, 2 Abb. P. 344; Hunter v. Lester, 18 How. P. 337; Haughey v. Wilson, 1 Hilton, 259; Kepp v. Fullerton, 4 Minn. 473; Cole v. Butler, 43 Maine, 401; Hendrick v. Whittemore, 105 Mass. 23; Wilson v. Call, 49 Iowa, 463.

<sup>2</sup> Gunn v. Plant, 94 U. S. 664; Hume v. Association, 72 Ind. 499; Sauer v. Twining, 81 Ind. 366; Evansville v. Evansville, 15 Ind. 395; Suelson v. State, 16 Ind. 29; Spaulding v. Baldwin, 31 Ind. 376; Deguindre v. Will-

tion of a few States as to courts held by justices of the peace, applies to every court and tribunal, judicial and quasi-judicial. It applies to all inferior courts from which an appeal lies; it applies to tribunals whose proceedings can be reviewed only on writ of error or certiorari, and in all cases where the party and cause or subject-matter is within the jurisdiction of the court rendering its judgment thereon; such judgment can not be assailed in any action, and is conclusive until reversed or set aside by a court or tribunal having authority to review such final determination.

- iams, 31 Ind. 444; *Ney v. Swinney*, 36 Ind. 454; *Cavin v. Graydon*, 41 Ind. 559; *Curry v. Miller*, 42 Ind. 320; *Board v. Markle*, 46 Ind. 96; *Markle v. Board*, 55 Ind. 185; *Faris v. Reynolds*, 70 Ind. 339; *Board v. Hall*, 70 Ind. 469; *Powell v. Clelland*, 82 Ind. 24; *Muncey v. Joest*, 74 Ind. 409; *Chambers v. Kyle*, 67 Ind. 206; *Harris v. McClanahan*, 11 Lea, 181; *Huyghe v. Brinkman*, 34 La. Ann. 831; *Ferguson v. Cumler*, 25 Minn. 183; *Commonwealth v. Steacy*, 100 Pa. 613; *McCreery v. Fortion*, 35 Tex. 641; *McAnnear v. Epperson*, 54 Tex. 225; *Tennell v. Breedlove*, 54 Tex. 543; *Mitchell v. Menley*, 32 Tex. 464; *Murchison v. White*, 54 Tex. 73; *Louis v. Ames*, 44 Tex. 320; *Howard v. McLaughlin*, 98 Pa. St. 440; *Bradstreet v. Butterfield*, 129 Mass. 339; *Woodward v. Baker*, 10 Oreg. 491; *Kein v. Strasberger*, 71 Ill. 303; *Willis v. Ferguson*, 46 Tex. 296; *Lancaster v. Wilson*, 27 Gratt. 624; *Crane v. Blum*, 56 Tex. 325; *Tucker v. Whitehead*, 58 Miss. 762; *Somers v. Losey*, 48 Mich. 294; *Bruster v. Compten*, 68 Ala. 299; *Schmidt v. Wright*, 88 Ind. 56; *Aucker v. McCoy*, 56 Cal. 524; *Chaffee v. Hooper*, 54 Vt. 513; *Gillitt v. Truax*, 27 Minn. 528; *Culver's Appeal*, 48 Conn. 165; *Caulfield v. Sullivan*, 85 N. Y. 153; *Cope v. Collins*, 37 Ark. 649; *Jennings v. Simpson*, 12 Neb. 553; *Johns v. Pattee*, 55 Iowa, 665; *Ordinary v. Poulson*, 43 N. J. L. 33; *Traer v. Whitman*, 56 Iowa, 443; *Perry v. Dickenson*, 75 Va. 475; *Hutton v. Laws*, 55 Iowa, 170; *Hellebush v. Richter*, 37 Ohio St. 222; *Neale v. Utz*, 75 Va. 480; *McAlpine v. Sweetzer*, 76 Ind. 78; *Marshall v. Stewart*, 80 Ind. 189; *Maynes v. Brockway*, 55 Iowa, 457; *Bank v. Hughes*, 10 Mo. App. 7; *Gall v. Fryberger*, 75 Ind. 98; *Stout v. Woods*, 79 Ind. 103; *Perry v. Murray*, 55 Iowa, 416; *Allman v. Taylor*, 101 Ill. 185; *Boston v. Robbins*, 126 Mass. 384; *Eure v. Paxon*, 80 N. C. 17; *Compton v. Sanford*, 30 La. Ann. 838; *Quiu's Succession*, 30 La. Ann. 947; *Guilford v. Love*, 49 Tex. 715; *Barnum v. Kenney*, 21 Kas. 181; *Finch v. Hohlinger*, 47 Iowa, 173; *Drake v. Henshaw*, 47 Iowa, 291; *Myers v. Davis*, 47 Iowa, 325; *Kauke v. Harrum*, 48 Iowa, 276; *Anderson v. Kimbrough*, 5 Cold. 260; *State v. McDonald*, 24 Minn. 43; *Scranton v. Ballard*, 64 Ala. 403; *Dock Co. v. Kinzie*, 93 Ill. 415; *Million v. Commissioners*, 89 Ind. 13; *Morris v. Gentry*, 89 N. C. 248; *Thompson v. Blanchard*, 2 Lea, 528; *Garner v. State*, 28 Kas. 790; *Porter v. Stout*, 73 Ind. 3; *Wild v. Deig*, 43 Ind. 455; *S. C.*, 13 American R. 399; *Simonton v. Hayes*, 88 Ind. 70; *Featherston v. Small*, 77 Ind. 143; *Coleman v. Fleming*, 82 Ind. 172; *Pickett v. Boyd*, 11 Lea, 493; *Hume v. Conduit*, 76 Ind. 593; *McCormick v. Webster*, 89 Ind.

Thus, where the statute of a State provided that the administration of the estate of an intestate shall be granted by the county court when the intestate "at or immediately before his death, was an inhabitant of the county," &c., the decision of the court on the question of inhabitancy, properly presented for its adjudication, is not open to examination in any other court.<sup>1</sup> So the

105; Keith v. Keith, 104 Ill. 397; Raymond v. Morrison, 59 Iowa, 371; Blair v. Hanna, 87 Ind. 298; Way v. Howe, 108 Mass. 50; Burpee v. Sparhawk, 108 Mass. 111; Black v. Blazo, 117 Mass. 17; Bank v. Carpenter, 129 Mass. 1; Hersey v. Jones, 128 Mass. 473; Lewis v. Leonard, 5 Ex. D. 165; Wadsworth v. Pickles, 5 Q. B. D. 470; Farwell v. Raddlin, 129 Mass. 7; Powers v. Bank, 129 Mass. 44; McDonald v. Simcox, 98 Pa. St. 619; Tarbox v. Hayes, 6 Watts. 398; Hauer's App., 5 W. & S. 493; Sloane v. McKinstry, 18 Pa. St. 120; Billings v. Russell, 23 Pa. St. 189; Clark v. Thompson, 47 Ill. 25; Conover v. Musgrave, 68 Ill. 60; Wimberly v. Hurst, 33 Ill. 172; London v. R. R., 88 N. C. 584; Nav. Co. v. Green, 3 Dev. 434; Granbury v. Moon, 1 Dev. 456; Barwick v. Wood, 3 Jones N. C. 806; Hampton v. Hardin, 83 N. C. 592; Greenwood v. Murray, 26 Minn. 259; Dusen v. Dupre, 32 La. Ann. 896; Davis v. Greve, 32 La. Ann. 420; Pick v. Strong, 26 Minn. 303; Finley v. Robertson, 17 S. C. 435; Bank v. Green, 4 Fed. R. 609; Blankenbaker v. Bank, 85 Ind. 459; Lowe v. Gruce, 69 Ala. 80; Dean v. Cotton Co., 64 Ga. 670; Jones v. Levi, 72 Ind. 586; Probate Court v. St. Clair, 52 Vt. 24; Holt v. Thacher, 52 Vt. 593; Dickenson v. Trenton, 33 N. J. E. 63; Winsor v. Bank, 81 Pa. St. 304; Wilson v. Gaston, 92 Pa. St. 207; Rollins v. Henry, 84 N. C. 569; McCrosky v. Parks, 13 S. C. 90; Scranton v. Ballard, 64 Ala. 492; Rigby v. Lefevre, 53 Miss. 639; Carter v. Rolland, 53

Tex. 540; Fulkerson v. Davenport, 70 Mo. 541; Denton v. Roddy, 34 Ark. 642; Mouis v. Jeffries, 53 Iowa, 302; Archer v. Grull, 67 Ga. 195; Hawks v. Hawks, 68 Ga. 832; Langston v. Marks, 68 Ga. 435; Taut v. Wigfall, 64 Ga. 412; Groves v. Williams, 68 Ga. 59; Maybin v. Knighton, 67 Ga. 103; Bailly v. Ross, 68 Ga. 735; Hall v. Anthony, 13 R. I. 221; Pratt v. Northam, 5 Mason, 95; Mallett v. Dexter, 1 Curtis, 178; Rhodon's Succession, 34 La. Ann. 893; Sherman v. Chase, 9 R. I. 166; Rhoad's Appeal, 39 Pa. St. 186; Sparhawk v. Buell, 9 Vt. 41; Hall v. Grovier, 25 Mich. 428; Clark v. Blackington, 110 Mass. 269; Pierce v. Irish, 31 Me. 254; Exedine v. Morris, 76 Mo. 416; Berney v. Drexel, 12 F. R. 303; Seminary v. Gage, 12 F. R. 393; Kelly v. West, 80 N. Y. 139; Gerould v. Wilson, 81 N. Y. 573; Orr v. O'Brien, 53 Tex. 149; Hubbard v. Hubbard, 7 Oreg. 43; Tibbotts v. Tilton, 4 N. H. 421; McLean v. Weeks, 65 Me. 411; Hunt v. Hunt, 72 N. Y. 217; Ins. Co. v. Le Blanc, 31 La. Ann. 100; State v. McDonald, 24 Minn. 48; Lyons v. Coolidge, 89 Ill. 529; Holmes v. R. R. Co., 6 Sawyer, 262; Walker v. Chase, 53 Me. 258.  
<sup>1</sup> Grignon v. Astor, 2 How. 338; Watkins, in re, 2 Pet. 204; U. S. v. Arredondo, 6 Pet. 709; Bogart, in re, 2 Sawy. 401; Florentine v. Barton, 2 Wall. 216; Comstock v. Crawford, 3 Wall. 403; Caujolle v. Ferric, 13 Wall. 465; McNitt v. Turner, 16 Wall. 333; Mehr v. Mannierre, 101 U. S. 424; Haggart v. Morgan, 5 N.

legality of the appointment of the administrator, curator, guardian, tutor, and such other representatives, by whatever name known, cannot be inquired into collaterally. So the probate of a will, where the court has jurisdiction, is conclusive unless vacated by an appeal. Whether the questions arising in the probate court were correctly or incorrectly decided as to the competency of evidence, can never be made a matter of inquiry in another court, to affect their adjudication.<sup>1</sup> It is final and conclusive upon all parties.<sup>2</sup> So the decisions of the judge of a probate, surrogate, county, ordinary, orphan's or other court, in all cases within his jurisdiction, are conclusive against all the world, unless vacated by an appeal.<sup>3</sup>

§ 367. If the principle once prevails that any proceeding of a court of competent jurisdiction can be declared to be a nullity by any court, after a writ of error or appeal is barred by limitation, then every county court and justice of the peace in the Union may exercise the same right. If, after its rendition, the

Y. 429; *Erwin v. Lowrey*, 7 How. 172; *McCormick v. Sullivan*, 10 Wheat. 199; *Kennedy v. Bank*, 8 How. 611; *Skinner v. May*, 6 Cranch, 267; *Bridge Co. v. Stewart*, 3 How. 424; *Smith v. Kernochen*, 7 How. 216; *Jones v. League*, 18 How. 81; *DeSorby v. Nicholson*, 3 Wall. 423; *Evans v. Gee*, 11 Pet. 83; *Wickliffe v. Owings*, 17 How. 48; *Lucas v. Todd*, 28 Cal. 85; *Haynes v. Meeks*, 20 Cal. 313; *Fisher v. Bassett*, 9 Leigh, 119; *Andrews v. Avory*, 4 Gratt. 229; *Abbott v. Coburn*, 28 Vt. 667; *Burdette v. Silsbee*, 15 Tex. 615; *Johnson v. Beazley*, 65 Mo. 264; *Bumstead v. Read*, 31 Barb. 664; *Bolton v. Brewster*, 32 Barb. 393; *Holmes v. R. R. Co.*, 6 Sawyer, 232; *Taut v. Wigfall*, 65 Ga. 412; *Brockenborough v. Melton*, 55 Tex. 493; *Candy v. Hanmore*, 76 Ind. 125; *State v. Slaughter*, 80 Ind. 597.

<sup>1</sup> *Patton v. Tallman*, 27 Me. 17; *Loosemore v. Smith*, 12 Neb. 34; *Orr v. O'Brien*, 55 Tex. 149; *Hubbard v.*

*Hubbard*, 7 Oreg. 42; *Prater v. Whittle*, 16 S. C. 41; *Exedine v. Morris*, 76 Mo. 416; *Berney v. Drexel*, 12 F. R. 393; *Semmary v. Gage*, 12 F. R. 398; *Duson v. Dupie*, 32 La. Ann. 896; *Pick v. Strong*, 26 Minn. 303; *Davis v. Greve*, 32 La. Ann. 420.

<sup>2</sup> *Dublin v. Chadborn*, 16 Mass. 433; *Noirvell v. Lesseur*, 33 Gratt. 232; *Loosemore v. Smith*, 12 Neb. 343; *Hubbard v. Hubbard*, 7 Oreg. 42; *Prater v. Whittle*, 16 S. C. 41; *Orr v. O'Brien*, 55 Tex. 149.

<sup>3</sup> *Tibbitts v. Tilton*, 4 N. H. 431; *McLean v. Weeks*, 65 Me. 411; *Davis v. Greve*, 32 La. Ann. 420; *Lebrew's Succession*, 31 La. Ann. 212; *Orr v. O'Brien*, 55 Tex. 149; *Hubbard v. Hubbard*, 7 Oreg. 42; *Finley v. Robinson*, 17 S. C. 435; *Exedine v. Morris*, 76 Mo. 416; *Freeman v. Rahm*, 58 Cal. 111; *Lowe v. Gruce*, 69 Ala. 80; *Lesseps v. Lapene*, 34 La. Ann. 112; *Blankenbaker v. Bank*, 85 Ind. 459; *Bank v. Green*, 4 Fr. 609.

judgment is declared void for any matter which can be assigned for error only on a writ of error or appeal, then such court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited by express statute law from ever reversing. The errors of a court do not impair the validity of their judgment. Binding until reversed, any objection to their full effect must go to the authority under which they have been conducted.<sup>1</sup>

§ 368. The rule, that an erroneous judgment can be avoided only by writ of error, has been so far relaxed where manifest injustice would be done to parties who have no right to reverse a judgment on writ of error, as to allow such parties to impeach a judgment by plea and proof, where the court had no jurisdiction, or it had been obtained by fraud or collusion, or was erroneously and unlawfully entered up; but that, "beyond this, the rules and principles of law do not authorize parties to proceed in the collateral impeachment of judgments, and when a judgment in a personal action is not liable to either of these objections, whether rendered on default, or after contestation, it is conclusive as to the relation of debtor and creditor between the parties, and the amount of indebtedness, and cannot be collaterally impeached by third parties in a subsequent suit, where such relation and indebtedness are called in question."<sup>2</sup>

It is a familiar doctrine that a proceeding to enjoin the enforcement of a judgment by execution constitutes a collateral attack upon the judgment, and cannot be maintained on account of errors or irregularity merely, but only upon a showing that the judgment is void.<sup>3</sup> So, a stay of execution, being a judgment by confession, the judgment is equally conclusive, and cannot be

<sup>1</sup> Voorhees v. Bank, 10 Pet. 449; Lancaster v. Wilson, 27 Gratt. 624; Cooper v. Reynolds, 10 Wall. 308; Elliott v. Piersol, 1 Pet. 328; Cox v. Thomas, 9 Gratt. 323; Harvey v. Tyler, 2 Wall. 328; Ballard v. Thomas, 19 Gratt. 14; Slater v. Maxwell, 6 Wall. 268; Cline v. Catron, 22 Gratt. 378.

<sup>2</sup> Strong v. Lawrence, 58 Iowa, 55; Ferguson v. Kumler, 11 Minn. 104; Star v. Star, 1 Ohio, 146; Candee v. Lord, 2 N. Y. 269; Swihart v. Shaum, 24 Ohio St. 432; Scott v. Wagon Works, 48 Ind. 75.

<sup>3</sup> Krug v. Davis, 85 Ind. 309; Gall v. Fryberger, 75 Ind. 98; Featherston v. Small, 77 Ind. 142; Stout v. Woods, 79 Ind. 108.

collaterally impeached.<sup>1</sup> This applies to parties entering into recognizances.

§ 369. Since the first edition of this work, there has been a sudden break in the long line of decisions which have so firmly established the principle that a judgment of a court of competent jurisdiction, a court of record, or a superior court, cannot be collaterally impeached. The leading case upon this subject is that of *Galpin v. Page*, 18 Wall. 350, followed by *Pennoyer v. Neff*, 95 U. S. 714, and the late case of *Settlemier v. Sullivan*, 97 U. S. 444. Some of the State courts have followed the two former cases, upon grounds stated in another portion of this work. There are two classes of cases where this new principle is deemed applicable, one where the service is constructive (by publication), where the record itself establishes the fact that the defendant is beyond the territorial limits of the jurisdiction,<sup>2</sup> and another class of cases, where the judgment is rendered by confession or default, that is, without appearance or defense. The reason for this new rule is the violation of that fundamental principle that no person shall be deprived of his property without due process of law. In that class of cases embraced in the decision in *Galpin v. Page*, much stress is laid upon the exception contained in the doctrine that the conclusive presumptions made in favor of a record of a court of superior jurisdiction, are applicable only in cases where the proceedings are according to the course of the common law, and that judgments rendered upon constructive service are not in accordance with the common law, thus declaring that at common law no judgment could be rendered except upon personal service.

§ 370. The rules announced in regard to the conclusiveness of judgments of superior courts, and the conclusive presumptions made in favor of their records as to jurisdiction over the subject-matter and the parties, residents of the State or Territory within which the courts are, whether the facts necessary to confer juris-

<sup>1</sup> *Anderson v. Kimbrough*, 5 Coldw. 260; *Hardenbrook v. Sherwood*, 72 Ind. 403; *Owen v. State*, 55 Vt. 47; *Beach v. Rich*, 13 Vt. 595; *Middlebury v. Ames*, 7 Vt. 166.

<sup>2</sup> *Galpin v. Page*, 18 Wall. 350.

diction are absent from the record or recited therein, which prevent their collateral impeachment, are rules as old as the law itself, and are sustained by an unbroken line of decisions, English, Federal and State. Where a judgment had been obtained upon constructive service, the record of which was sought to be impeached in a collateral action, on the ground that a judgment rendered on such service, *not being according to the course of common law, the conclusive presumption* made in favor of records of superior courts did not apply, the learned judge, in delivering the opinion of the court, said: 'Judicial systems and modes of administering justice, like everything else, are liable to change. In the organization of courts, in the distribution of powers, and in the mode of exercising them, the States of the American Union have departed widely from the course which from the outset was observed in England, and is in a great measure still preserved; yet the fundamental principles by which the administration of justice is governed remain unchanged, or changed only so far as to keep pace with the progress of the human understanding. In view of these changes, words and modes of expression, once definite and apt to the purpose, have to some extent ceased to be so, and they must be modified or added to for the purpose of applying, in an intelligible manner, familiar and unchanging principles to new conditions. Otherwise we make words superior to sense, and follow the shadow instead of the substance, forgetting that its adaptability to new conditions is the crowning glory of the common law. The use of the words 'superior' and 'inferior,' or 'limited' and 'general,' and 'proceeding according to the course of the common law,' in the statement of the rule in question, however apt they may have once been, are less so at this time and place, and their duties, in view of our system and mode of procedure, would be better performed by the terms 'courts of record' and 'courts and tribunals not of record.' If anything further is added, the phrase 'proceeding according to the course of the statute which regulates proceedings in civil cases,' should be employed, instead of the phrase under consideration, for the statute has superseded the common law, without, however, abrogating the rule in hand, the conditions

<sup>1</sup> Hahn v. Kelly, 34 Cal. 414.

being changed, but not the principle. Our district courts, county courts, and probate courts,—the latter having been put in this respect upon the level of superior courts at common law by express statutory provision,—are superior courts in the sense of this rule, while courts held by justices of the peace, boards of supervisors, and other boards exercising judicial functions of a limited and special character, are inferior. Superior courts, at common law, in the sense of this rule, were those which sat in Westminster Hall—the King's Bench, the Common Pleas, and Exchequer—the former, as originally instituted, having jurisdiction in criminal cases, the second in civil actions, and the latter in matters of revenue. In a certain sense, their jurisdiction was limited and special, but in the sense of this rule it was general, that is to say, general within their sphere of action. So with our courts of record. Each is confined to its limits, as fixed by the Constitution, and in that sense is limited as to its jurisdiction, but in the sense of this rule it has general jurisdiction of the particular department of the law allotted to it. In discussing this point, so far, we have assumed that constructive service is unknown to the common law. The precise mode provided by our statute may be, but it will certainly not be claimed that there can be any distinction founded upon a mere difference in the mode by which constructive service is obtained. The only rational or plausible ground for any distinction lies between actual and constructive notice and no notice. If there is any hardship in the rule, as defined by us, or any necessity for the distinction asserted by respondents, it grows out of a want of notice, for beyond or within a want of notice neither the charge of hardship nor the call of necessity can find a point upon which to rest. The idea, then, that a court which undertakes to obtain jurisdiction of the person of a defendant, by constructive service of its process, is proceeding contrary to the principles upon which the course of the common law is based, is founded in a mistake, for constructive service is not a stranger to the course of the common law. In cases similar to those in which we resort to service by publication, there has always been some mode by which jurisdiction has been obtained at common law, amounting or equivalent to constructive service. In the courts of common law, 'if the sheriff cannot find the defendant upon the first writ of *capias*, and a

return of *non est inventus* is returned upon all of them, then a writ of *exigent* or *exigi facias* may be sued out, which requires the sheriff to cause the defendant to be proclaimed, required, or exacted in five county courts successively, to render himself, and if he does, then to take him as in a *capias*; but if he does not appear, and is returned *quinto exactus*, he shall then be outlawed by the coroners of the county.' So, in chancery, 'if the sheriff returns that the defendant is *non est inventus*, then an attachment with proclamation issues, which, besides the ordinary form of attachment, directs the sheriff that he cause public proclamation to be made throughout the county, to summon the defendant, upon his allegiance, personally to appear and to answer. If this be also returned with a *non est inventus*, and he still stands out in contempt, a commission of rebellion is awarded against him for not obeying the king's proclamation, according to his allegiance, and four commissioners therein named. or any of them, are ordered to attach him wherever he may be found in Great Britain, as a rebel and contemner of the king's laws and government, by refusing to attend his sovereign when thereunto required. . . . If upon the commission of rebellion a *non est inventus* is returned the court then sends a sergent-at-arms in quest of him, and if he eludes the search of the sergent-at-arms, then a sequestration issues to seize all his personal estate, and the profits of his real, and to detain them subject to the order of the court. . . . After an order for a sequestration issues, the plaintiff's bill is to be taken *pro confesso*, and a decree to be made accordingly.' These modes of proceeding have been improved upon in England as well as in the United States. The statute<sup>1</sup> provides that where the defendant cannot be found to be served with process of subpœna, and absconds (as is believed), to avoid being served therewith, a day shall be appointed him to appear to the bill of the plaintiff, which is to be inserted in the *London Gazette*, read in the parish church where the defendant last lived, and fixed up at the Royal Exchange; and if the defendant doth not appear upon that day, the bill shall be taken *pro confesso*.' So, whatever meaning may be attached to the phrase 'proceeding according to the course of the common law,' as used

<sup>1</sup> Geo. 2nd, c. 25

in the books, it cannot be understood to mean personal or actual service of process only.”<sup>1</sup>

§ 371. For a court to declare that at common law there was no provision for any but personal service is to declare, first, that none but residents who were continuously within the jurisdiction of the court were the owners of real or personal property within the jurisdiction of the court; second, that there was no means of enforcing demands against foreigners unless they came within the jurisdiction of a tribunal, although they may have had ample assets that might be made available. If these premises are correct—but that they are not must be evident. Proceedings by attachment of a debtor’s property for satisfaction of a creditor’s demand is one of great antiquity. Even in the Civil Law “it was unlawful to force any person from his own house, for this was esteemed his sanctuary (*tutissimum refugium et receptaculum*). But if any man lurked at home to elude a prosecution (*si fraudationis causa latitaret. Cic Quint., 19*), he was summoned (*evocabatur*) three times, with an interval of ten days between each summons, by the voice of a herald, or by letters, or by edict of the praetor; and if he did still not appear (*se non sisteret*) the prosecutor was put into possession of his effects.”<sup>2</sup> This custom was known in England long before the arrival of William the First, and has been a part of the common law from time immemorial. If service was not made by publication in a gazette or newspaper, it was made by posting or proclamation. So that the distinction between judgments upon constructive and personal service, as not being in accord with or contrary to the common law, is untenable. There must have been similar remedies at common law against non-residents. There may have been a distinction in the preliminary steps, but this did not affect the remedy, nor does it show that a proceeding against a debtor’s property without personal service was unknown to the common law. A statute exempting a debtor’s homestead from a sale under judgment is in derogation of the common law, for there were no such exemptions; but a statute which enforces and adopts a common law remedy, and provides the necessary steps for its enforcement, is not contrary to the

<sup>1</sup> Bl. Com. book 3.

<sup>2</sup> Adams R. Ant. 194.

common law, for the reason that it does not create an innovation upon the common law. It must therefore be some proceeding other than such as may be called constructive service or process that is meant by the term special and summary powers wholly derived from statute, and not according to the course of the common law, and which do not belong to it as a court of general jurisdiction, for if the statute were silent on the subject constructive service would have to be made according to the common law.

§ 372. Constructive and personal service being according to the course of the common law, the same presumption applies in favor of all judgments of superior courts of general jurisdiction, whether rendered upon constructive or personal service;—the distinction between the two judgments being as to their effect, and this is described as being *in rem* and *in personam*, the latter following the person and can be made available in any jurisdiction where the debtor may be until satisfaction, the former is of no force or effect whatever when the *res* is disposed of in satisfaction of the judgment, and virtually gives the court no power to render a judgment for a larger amount than the proceeds of the property will satisfy; as to all over that amount the judgment is *functus officio* for any purpose unless the defendant appears in the action. No State Legislature can change the effect of this judgment and make it effectual as a personal judgment for any greater amount than the sum realized from the sale of the property seized in order to confer this jurisdiction, for if the service is constructive only, such legislation would be absolutely void as conflicting with the fundamental doctrine that no person shall be deprived of his property without due process of law. The doctrine in regard to the conclusive effect of judgments rendered upon constructive service is ably stated by Mr. Justice Miller:<sup>1</sup> “It is an axiom of the law that when a judgment of a court is offered in evidence collaterally in another suit, its validity cannot be questioned for errors that do not affect the jurisdiction of the court which rendered it.” In this case there had been a seizure of the *res* that he said gave the court jurisdiction, and whether

<sup>1</sup> Cooper v. Reynolds, 10 Wall. 808.

the proceedings thereafter were regular or not, the remedy for errors and irregularities was by appeal or review, and were not available in a collateral action. *Galpin v. Page*, upon a hasty consideration, would seem to be controlled by that case, as the omission within the decision of *Cooper v. Reynolds* could not affect the judgment in the Federal court; but there is this essential distinction between the two cases: In the former it was a collateral attack, in *Galpin* case, the original judgment had been declared void by the Supreme Court of California on appeal, and the United States Circuit Court, when that judgment was offered collaterally, held the judgment valid. So that the Supreme Court of the United States simply accorded the judgment the same faith it had received by the highest court of the State in which it was rendered. Prior to the reversal of the decree by the Supreme Court of the State, the land had been sold and purchased by the plaintiff's attorney, and upon reversal the cases were dismissed in the court below. *Galpin v. Page* was for the recovery of the land, and the real question in the case—was, the effect of the purchase by the attorney for the plaintiff did it to afford him the protection accorded to *bona fide* purchasers, and was the original decree a protection to him as such? This being the question at issue, the rest of the opinion, able and correct as it is, were the point covered by it at issue in this case, must be regarded as *obiter*, as the reversal of the original decree by the Supreme Court of California and the subsequent dismissal of the suits left the whole transaction as if no suit had been commenced, and the well-settled rule that an attorney of record is chargeable with notice and is not entitled to protection as a purchaser was the only issue in the case, and the decision of this matter necessarily disposed of it.

§ 373. In Iowa and Kansas a rule has been announced which certainly cannot be said to be founded on principle—but may be based upon the ground of protection to parties by which courts may take notice of the capacity of the class of people elected as constables and justices of the peace (especially in the Western States), who have no qualifications for the position; men, in many instances, utterly irresponsible, and, therefore, unable to fully respond in actions for damages or false returns. It is held that in an action upon a judgment rendered by a justice of the peace

it may be shown by extrinsic evidence, in the face of a recital contained in the judgment that the defendant was served with notice, that in fact he had no notice, and that the judgment was therefore void, for want of jurisdiction.<sup>1</sup>

§ 374. The Supreme Court of Kansas has gone farther in this respect than this. In an action brought before a justice of the peace, where service was obtained, in accordance with the statutory requirements, judgment rendered, and a transcript of the record filed in the district court, in order to affect real estate. Land was levied on and sold under an execution issued out of the district court; several years afterward, in an action of ejectment, the defendant's grantees were allowed to contradict the service and record, and recovered the land thus sold. The opinion is not entitled to any weight, having been delivered by one judge, concurred in on other grounds by another, and dissented from by the third. It is hardly possible to lay down a rule or deduce a doctrine from such cases as these, especially when the Supreme Court of the United States can, in collateral actions, declare void judgments rendered by a State court of general jurisdiction, where the fact of service is found: The cases sustaining the doctrine, that where there is a recital in the record of a court of competent jurisdiction that the defendant, a citizen of the State in which the proceedings were had, was duly served, but made default, and judgment was rendered against him and that such a record cannot be impeached in a collateral action, have been set aside in a case *where both parties were residents of the same State*, and service was made by leaving a copy of the summons with the indorsement thereon with the wife of the defendant, at his residence, that court holding that because the return did not show the reason why it was left at the residence of the defendant and delivered to his wife, that the judgment was void, and this in a collateral proceeding.<sup>2</sup>

§ 375. In almost every State there is a provision for service of this kind, either upon the party personally or at the usual place of his residence within the county. Under the above rul-

<sup>1</sup> Salliday v. Bainhill, 29 Iowa, 555; 609; Culver's Appeal, 48 Conn. 165. S. P., Newcomb v. Dewey, 27 Iowa,      <sup>2</sup> Settlementer v. Sullivan, 97 U. S. 381; Ferguson v. Crawford, 86 N. Y. 444.

ing, every service not made upon the party *in person* is constructive or substituted. If this be correct, there have been in this country more void than valid judgments. If a Legislature, as between citizens of the same State, subject to and bound by its laws, declares, as between those parties, service may be made by delivering a copy of the summons to the defendant or by delivering a copy to some white person of the family, above the age of fourteen, at the dwelling-house or usual place of abode of the defendant, is equal to personal service, it is difficult to perceive where the authority of the Supreme Court of the United States or any Federal court is given to question it. They certainly have no jurisdiction in the original action, for it is between citizens of the same State. If they have no jurisdiction in the original action, have they, as against a grantee or privy of the defendant in a collateral action, if the defendant is bound by the judgment in the State court? Is not every privy in law or estate bound by the same judgment? It seems not, for in this case the defendant's grantee, claiming under him, with notice of the judgment, by a court of competent jurisdiction, whose record recited that the defendant was duly served and made default, a judgment under which the defendant himself had seen his property sold some fifteen years prior to the time of his conveyance, his debt paid with the proceeds thereof, and the execution purchaser in possession for all that period, he never questioning his title; and yet his grantee comes into a Federal court in a collateral action (an action of ejectment), and successfully assails a record that is absolute verity as to his grantor. If this is to be the law, that after the statute of limitations bars an action on the original debt, the defendant or his grantee can commence proceedings in the Federal court and recover his property notwithstanding a recital in the record of a court of competent and superior jurisdiction (having jurisdiction over the territory in which he is a *bona fide* resident with his family, and having jurisdiction of the subject-matter, over the process, and of the trial,—all of these jurisdictional matters having been conferred by the Legislature of the State, its judgment is, therefore, binding on the defendant,—such court, in order to render a judgment, having been compelled to pass upon the question of jurisdiction over the person, in order to render its proceedings of any validity), the Federal court will

allow him or his privies to collaterally assail the judgment so rendered and hold it null and void. The whole doctrine of *res judicata* had better be blotted out of existence and a new one thus formulated. No proceedings in a State court are of any effect against a collateral attack in a Federal court; the Federal courts, under the Fourteenth Amendment, having the constitutional right in collateral actions to nullify the most solemn proceedings of all State courts (unless the record is filled with corroborating evidence of every fact stated therein, upon which the power of the tribunal to hear and determine the cause is founded), as no presumption will be made in favor of the validity of a judgment unless all these facts, with an accurate history of the defendant, in order to identify him, are made part of the record. If the court finds that he was *duly* served, without reciting the evidence upon which it based its finding, its judgment is absolutely void. The maxim, *Omnia rite esse acta*, &c., although repeatedly and universally applied by every court in the civilized world, including the United States Supreme Court, has no application. For after this decision no court can now presume that legal tribunals, before rendering judgment, ascertained whether they had jurisdiction so to do, especially where they are courts of superior jurisdiction, and in all cases where service is made in accordance with the thirteenth equity rule of the United States Supreme Court or a State statute providing "that service may be made on the defendant personally, or by leaving a copy at his usual place of abode, or with some adult person, a resident of his family; that the officer left a copy of the summons at the place of abode, &c, not because he was unable to deliver it in person, but the presumption will be that the officer actually and willfully neglected his official duty, for the purpose of making "substituted service": and a court of competent jurisdiction rendering a judgment upon this service, in accordance with such rule or statute, unless the return shows on its face why the officer left it at the place of the defendant's abode, renders it without jurisdiction. The court, by Judge Field, in the *Settemier* case says: "The statute provides that in actions *in personam* service should be made by the sheriff delivering to the defendant personally, or if he should not be found, to some white person of his family over the age of fourteen years, at his dwelling-house or usual

place of abode, a copy of the complaint and notice to answer. The action was for the recovery of money, and the sheriff's return showed that service was made "by delivering to the wife of the defendant, a white woman, over fourteen years of age, at the usual place of abode." On a judgment rendered and a recital in the record that the "defendant, although duly served with process, came not, but made default," the majority of the Supreme Court of the United States say: In case the defendant can not be found, the inability of the officer to find the defendant should be affirmatively stated in his return; *it is not a fact that will be inferred; the authority for substituted service must be strictly pursued.* A personal judgment rendered against the defendant so served, where the return of the officer fails to show that the defendant could not be found, is void, for want of jurisdiction of the court rendering it over the person of the defendant." This is the correct rule in cases of "constructive or substituted service, but the service in this case can not be classed as that kind. Taking the rule as an abstract proposition, it is correct, but as applied to the facts in the case, it is far from being so. Mr. Justice Field, who delivered the opinion in this case, also delivered the opinion of the Supreme Court of the United States, in the case of *Galpin v. Page*, to which he refers, but he fails to adopt that part of his opinion, in which he, speaking for the court, says: "The presumptions indulged in support of the judgments of the Superior Courts of general jurisdiction are also limited to *jurisdiction over persons within their territorial limits, persons who can be reached by their process*, and also over proceedings which are in accordance with the course of the common law." The parties in this case were within the territorial limits of the court, yet this universal, well-settled principle was not applied. The learned judge evidently disregarded the distinction made by the Supreme Court of the United States, and made by every court in the country. The distinction between a direct, and a collateral, attack, on appeal or writ of error, if successful, remands the parties to their rights as they were prior to the rendition of the judgment giving an opportunity for the correction of any errors; in the case of a collateral attack, the plaintiff is without remedy,

<sup>1</sup> *Settlemier v. Sullivan*, 97 U. S. 444.

upon the ground forcibly stated in *Pennoyer v. Neff*, and *Galpin v. Page*, that the exertion of authority beyond the territorial limits of a State is a mere nullity. If a judgment, valid in the State where rendered, should, in a collateral action in another jurisdiction in the same State, be declared void, what effect will such determination have upon the judgment in the jurisdiction where rendered? Will it restore the parties to their original rights? Will it avoid the bar of the statute limitation? Will it prevent the defendant from setting up the plea of *res judicata*? Certainly not. By what authority, then, can a Federal court in a collateral action bind a State court in declaring a judgment rendered between two of its citizens absolutely void? What right, in the language of the Supreme Court of the United States, has a Federal court to arrogate to itself the power to revise or review a judgment of a foreign jurisdiction? If that right is conceded, any justice of the peace has the same right to declare a judgment of the Supreme Court of the United States void. The principle is the same, and while it is to be deprecated that such an arbitrary power is supposed to exist and is exercised by Federal courts, it needs only to be applied by the inferior tribunals of a State in order to correct this self-arrogated authority. Of what use are statutes of limitation, fixing a specified time for complaining of the proceedings of a court? If a party is injured, let him complain of it in such time as not to injure his adversary by unnecessary delay in asserting his rights, says the Supreme Court of the United States; if he fails to, and has lost his right of complaining, there is another axiomatic principle applicable, that no court will permit a man or his privies in a circuitous manner to do that which he cannot do directly. The learned judge in this case ignores every case in the Supreme Court of the United States, commencing with *Kemp v. Kennedy*, and the subsequent cases.<sup>2</sup> In the last case cited, that court held that a

<sup>1</sup> *Voorhees v. Bank*, 10 Pet. 473

<sup>2</sup> *Kemp v. Kennedy*, 5 Cranch, 173; *Thompson v. Tolmie*, 2 Pet. 157, U. S. v. *Arredondo*, 6 Pet. 729; *Voorhees v. Bank*, 10 Pet. 449; *Watkins*, in re, 3 Pet. 193; *R. I. v. Mass.*, 12 Pet. 646; *Cocke v. Halsey*, 16 Pet. 87, *Grignon*

*v. Astor*, 2 How. 319; *Bank v. Moss*, 6 How. 40; *R. R. Co. v. Stimpson*, 14 Pet. 458; *Erwin v. Lowrey*, 7 How. 181; *Nations v. Johnson*, 24 How. 203; *Parker v. Kane*, 22 How. 14, *Gunn v. Plant*, 91 U. S. 664, *Huff v. Hutchinson*, 14 How. 588, *Gaines v. Relf*, 12

certificate of stock in the possession of a party in the so called Confederate States, during the late war, was legally in the custody of the court, by the simple fact that the marshal had returned that he seized it, his seizure being a garnishment process upon the corporation issuing the stock, and it was held to be legally confiscated upon the strength of that return, which was made by an officer, and not by a court, and the doctrine thus announced; "We hold that wherever a judgment is given by a court having jurisdiction of the parties, and of the subject-matter, the exercise of that jurisdiction warrants the presumption that the facts which were necessary to confer jurisdiction were found."

In another opinion by Judge Field: "The recital in the record of a proceeding under a statute, of facts necessary to give such jurisdiction are *prima facie* evidence of the facts recited. The jurisdiction existing, the subsequent action of the court in the exercise of its judicial authority, *can only be questioned on appeal.*" "Every presumption is to be indulged in in favor of their jurisdiction; and their judgments, however erroneous, cannot be questioned, when introduced collaterally, unless it be shown affirmatively that they had no jurisdiction." The courts are presumed to have adjudged every question necessary to justify the order or decree.<sup>4</sup> "It is an axiom of the law that when a judgment of a court is offered in evidence collaterally in another suit, its validity cannot be questioned for errors that do not affect the jurisdiction of the court which rendered it." This case was a proceeding *in rem*, in which any number of irregularities appeared, sufficient to reverse the judgment on appeal, but none to avoid it collaterally." The same court by Mr. Justice Wayne, say, "with what propriety then can this court now be called upon to review a judgment of the parish court of New Orleans, for any irregularity or illegality in the proceedings of that court, if either existed, when there

How. 564; McCall v. Carpenter, 18 301

How. 305; Shriver v. Lynn, 2 How.

56; McGoon v. Scales, 9 Wall. 23;

Gray v. Brignardello, 1 Wall. 634; Mil-

ler v. U. S., 11 Wall. 391.

<sup>1</sup> Erwin v. Lowrey, 7 How. 181;

affirmed in Miller v. U. S., 11 Wall.

<sup>2</sup> Comstock v. Crawford, 3 Wall.

396.

<sup>3</sup> Harvey v. Tyler, 2 Wall. 342.

<sup>4</sup> Florentine v. Barton, 2 Wall.

216.

<sup>5</sup> Cooper v. Reynolds, 10 Wall. 308.

could have been an appeal to the Supreme Court of Louisiana for its protection? This court has never done so in any case in which the subject matter of the suit, being within the jurisdiction of the State court, upon an allegation that its judgment was contrary to the laws of the State. That court had full power, it exercised its jurisdiction, and the legality of its judgment cannot be questioned by this court."

§ 376. In the *Settlemeier* case the fourteenth amendment is not referred to, as in the cases of *Penoyer v. Neff* and *Galpin v. Page*; not being in point, as the judgment debtor was not seeking to avoid or impeach the judgment, his acquiescence in it for fifteen or sixteen years, and the sale under it, made it *res judicata* as to him; though it might have been reversible for error by the Supreme Court of the State, if proceedings had been commenced for that purpose within the statutory time. Mr. Justice Field cites the case of *Trullinger v. Todd*,<sup>2</sup> in which the judgment was reversed upon appeal, and the cause remanded to the court below for sufficient service to be shown before rendering judgment. That case establishes the rule stated by Mr. Justice Wayne, in the case above cited; that the *Settlemeier* case was subject to appeal and reversal in a direct proceeding by the Supreme Court of Oregon (and had the defendant appealed from the judgment it might have been set aside, the cause remanded, and the sheriff allowed to amend his return so as to show why he did not serve the defendant in person, if that was necessary), and therefore not subject to review or attack in a collateral action by a Federal court. It is under this rule *res judicata*. It is an irregularity merely, which did not avoid the judgment, but as to all collateral attacks it was *res judicata*.

§ 377. There are two great objections to the doctrine sought to be established in the *Settlemeier* case. The first is to the construction given to this mode of service. Such service, if not technically personal service, is by statute in the various States such service as will support and authorize a court to render a

<sup>1</sup> *Adams v. Preston*, 22 How. 488; 471; *Gaines v. Chew*, 2 How. 619; *Fouvergne v. New Orleans*, 18 How. Tarver v. Tarver, 9 Pet. 174.

<sup>2</sup> 5 Oreg. 36.

personal judgment.<sup>1</sup> It is not a substitute for personal service, it is not in any sense constructive, it does not require any proceeding to warrant an order of publication, for none could be made in a case between citizens of the same State in an action brought in a court having territorial jurisdiction over the parties. The defendant was a resident of the State of Oregon, he was bound by its laws as to the mode of service, and if he had any grievance the same power that made its laws created tribunals to afford him adequate relief. It is not constructive service or substituted service in the sense in which the term is used as service by publication. The Supreme Court of the United States by the 13th equity rule has adopted a similar mode of service "by the delivery to the defendant in person or the delivery to some adult person either resident or a member of the family at the dwelling house or usual place of abode of the defendant." And no question has ever yet been made under this kind of service that it was either substituted or would warrant the Federal courts in rendering a decree *in personam* either by default or otherwise. And in a late case in the Federal courts (with the decision in the *Settlemeier* case, as conclusive upon the question of service), the court held that where there was a store in the lower part of the building which was used by the defendant as a place of business and the upper part as his dwelling, that service by delivering a copy of the subpoena for the wife, to her husband, was sufficient service on the wife.<sup>2</sup> In this case the marshal was not required to state in his return why he did not ascend to the upper part of the building and find the wife, and failing to find her in her place of abode, he left the copy with her husband—"such service being substituted service according to the *Settlemeier* case."

§ 378. The second objection is that it abrogates the doctrine founded on this general rule, that a question or fact, once determined and adjudged, by a court having authority to make the inquiry and adjudication, is conclusively determined, unless the judgment is set aside on appeal to some higher court, or upon some direct proceeding within the recognized rules of law to

<sup>1</sup> *Dunklee v. Elston*, 71 Ind. 535; *Hall v. Graham*, 49 Wis. 553.  
*Smithson v. Briggs*, 33 Gratt. 180;   <sup>2</sup> *Ins. Co. v. Wulf*, 9 Biss. 285.

annul it.<sup>1</sup> It is also well settled that when the question of jurisdiction is one of fact, and is decided by the court whose proceedings are in question, the decision is final whether the question arises on a writ of error, or in a collateral action.<sup>2</sup> The Supreme Court of the United States say where a decree is an adjudication of all the facts necessary to give jurisdiction, whether they existed or not is immaterial if no appeal is taken, the rule is the same whether the law gives an appeal or not, it is conclusive on all whom it concerns;<sup>3</sup> and it is also held, where the court has jurisdiction over a particular class of cases, it is the province of the court to determine for itself whether the particular case is within its jurisdiction.<sup>4</sup>

§ 379. In the leading case of *Voorhees v. Bank of United States*, the Supreme Court of the United States said: "It is among the elementary principles of the common law, that

<sup>1</sup> *Grignon v. Astor*, 2 How. 338; *Watkins, Ex parte*, 3 Pet. 204; *U. S. v. Arredondo*, 6 Pet. 709, *Bogart, in re*, 2 Sawyer, 401; *Florentine v. Barton*, 2 Wall. 216; *Comstock v. Crawford*, 3 Wall. 403; *Caujolle v. Ferrie*, 13 Wall. 465; *McNitt v. Turner*, 16 Wall. 303; *Mohr v. Mannierre*, 101 U. S. 424; *Haggart v. Morgan*, 5 N. Y. 429; *Erwin v. Lowrey*, 7 How. 172; *McCormick v. Sullivant*, 10 Wheat. 199; *Kennedy v. Bank*, 8 How. 611; *Skilern v. May*, 6 Cranch, 267; *Bridge Co. v. Stewart*, 3 How. 424; *Smith v. Kernochen*, 7 How. 216; *Jones v. League*, 18 How. 81; *De Sorby v. Nicholson*, 3 Wall. 423; *Evans v. Gee*, 11 Pet. 83; *Wickliffe v. Owings*, 17 How. 43; *Lucas v. Todd*, 28 Cal. 185; *Haynes v. Meeks*, 20 Cal. 313; *Fisher v. Bassett*, 9 Leigh, 119; *Andrews v. Ivory*, 4 Gratt. 229; *Abbott v. Coburn*, 28 Vt. 667; *Burdett v. Silsbee*, 15 Tex. 615; *Johnson v. Beazely*, 65 Mo. 264; *Bumsted v. Read*, 31 Barb. 664; *Bolton v. Brewster*, 32 Barb. 393; *Holmes v. Ry. Co.*, 6 Sawyer, 262; *Taut v. Wigfall*, 65

Ga. 412; *Brockenborough v. Melton*, 55 Tex. 493; *Candy v. Hanmore*, 76 Ind. 125; *State v. Slaughter*, 80 Ind. 597. See *Ante*, § 60, pp. 58, 59 and 60.

<sup>2</sup> *Riley v. Waugh*, 8 Cush. 220, *R. v. Evansville*, 15 Ind. 395; *Cooper v. Sunderland*, 3 Iowa, 114; *Vale v. Owen*, 19 Barb. 22; *Botsford v. O'Connor*, 57 Ill. 72; *Johnson v. Kerkhoff*, 35 Mo. 291; *Latrielle v. Dorlerque*, 35 Mo. 233; *Russell v. Union*, 73 Ill. 337; *Davis v. Dresbach*, 81 Ill. 393; *Todd v. Crump*, 5 McLean, 172; *Searle v. Galbraith*, 73 Ill. 269; *Moriow v. Weed*, 4 Iowa, 88; *Lyon v. Vanatta*, 35 Iowa, 535; *Shawhan v. Loffer*, 24 Iowa, 226; *Bowman v. Sanborn*, 25 N. H. 87; *Vassault v. Austin*, 36 Cal. 691; *Smith v. Wood*, 37 Tex. 616; *Dyckman v. Mayor*, 5 N. Y. 484; *Blin v. Campbell*, 14 Johns. 423; *Offutt v. Offutt*, 2 Ill. & G. 278; *Schindel v. Suman*, 13 Md. 10; *Meier v. Chase*, 9 Allen, 242.

<sup>3</sup> *Grignon v. Astor*, 2 How. 319.

<sup>4</sup> *Cox v. Thomas*, 9 Gratt. 323; *Fisher v. Tucker*, 9 Leigh, 119.

whoever would complain of the proceedings of a court, must do it in such time as not to injure his adversary by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into court, he must do it before he submits to the process adopted. If the proceedings against him are not conducted according to the rules of law and the court, he must move to set them aside for irregularity; or, if there is any defect in the form or manner in which he is sued, he may assign those defects specially, and the court will not hold him answerable till such defects are remedied. But if he pleads to the action generally, all irregularity is waived, and the court can decide only on the rights of the parties to the subject matter of controversy; their judgment is conclusive, unless it appears on the record that the plaintiff has no title to the thing demanded, or that in rendering judgment they have erred in law; all defects in setting out a title, or in the evidence to prove it, are cured, as well as all irregularities which may have preceded the judgment. So long as this judgment remains in force, it is in itself evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment; the errors of the court, however apparent, can be examined only by an appellate power; and by the laws of every country a time is fixed for such examination, whether in rendering judgment, issuing executions, or enforcing it by process of sale. No rule can be more reasonable, than that the person who complains of an injury done him, should avail himself of his legal rights in a reasonable time, or that that time should be limited by law. This has been done by acts of limitation on writs of error and appeals. If that time elapses, common justice requires that what a defendant cannot do directly in the mode pointed out by law, he shall not be permitted to do collaterally by evasion."

§ 380. "A judgment or execution irreversible by a superior court cannot be declared a nullity by any authority of law. If it has been rendered by a court of competent jurisdiction of the parties and the subject matter, with authority to use the process it has issued, it must remain the only test of the respective rights of the parties to it. If the validity of a sale under its process can be questioned for any irregularity preceding the judgment, the court which assumes such power places itself in the position

of that which rendered it, and deprives it of all power of regulating its own practice or modes of proceeding in the progress of a cause to judgment. If after its rendition it is declared void for any matter which can be assigned for error only on a writ of error or appeal, then such court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited by express statute law from even reversing. If the principle once prevails, that any proceeding of a court of competent jurisdiction can be declared to be a nullity by any court, after a writ of error or appeal is barred by limitation, every County Court, or justice of the peace in the Union, may exercise the same right, from which our own judgments or process would not be exempted. The only difference in this respect between this and any other court is, that no court can revise our proceedings; but that difference disappears, after the time prescribed for a writ of error or appeal to revise those of an inferior court of the United States or of any State; they stand on the same footing in law." "The errors of the court do not impair their validity, binding till reversed, any objection to their full effect must go to the authority under which they have been conducted. If not warranted by the constitution or laws of the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done *coram non judice*; that is, by persons assuming the judicial function in the given case without lawful authority. The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity, in the other, mere waste paper; there can be no middle character assigned to judicial proceedings, which are irreversible for error."<sup>1</sup>

§ 381. Confessedly, the defendant was within the jurisdiction of the court. At the time the suit in question was com-

<sup>1</sup> Voorhees v. Bank, 10 Pet. 449.

menced, he resided there with his family. The summons was left with his wife, at his usual place of abode; there was no question raised in this case that it was not so served, and that it was not his usual place of abode, and if it was not good service of the process, it was on account of the omission of the person serving it, to state in his return that the defendant was not personally found. But, the infirmity of this objection is, that the Federal court was bound to assume, in absence of all proof upon the subject, that such service was actually made—that is, a service unaccompanied with this statement was valid by the laws of Oregon. This is a presumption *de jure*, because the record showed that the court rendering judgment declared such service was due and legal, or, in the language of the record, “that said defendant was duly served.” It is one of the unquestionable prerogatives of every independent government to prescribe the method by which parties interested shall be apprised of the pendency of proceedings in its tribunals, and such method can be repudiated and the adjudication founded thereon can be invalidated by the courts of other governments, State or National, only where it is so plainly inefficacious as a means of notification that its nominal operation must, in the main, result in decisions against persons out of the jurisdiction, and who have no knowledge of the danger with which they are threatened. The rule established by the authorities, to which reference has been made, is, that the judgment cannot be disregarded in the collateral suit, unless the notice to bring the defendant into court has been, on account of its inefficacy, inconsistent with that general canon of jurisprudence which, in all cases, requires that a person must be offered a hearing before his rights can be affected by judicial action. But it is undeniably clear, that copy of process left with the wife of the party is not a notice of this character. It may be wise legislation to prescribe that the server of the summons shall state in his return the reason why he pursued one of the alternative methods of serving process, in all cases where he does not serve the party personally. Or, it may be wise legislation to permit personal service only, and compel a return to be made before a copy of process can be left at the usual place of abode of a defendant, with his wife or some adult person over the age of fourteen, but it would be altogether extravagant to

insist that such completeness of service is one of the inalienable rights of men. The laws of a State on this subject can be repudiated by the courts of a sister State or the Nation, when they are so framed as to clearly violate any of those fundamental maxims on which society rests. It would seem quite fanciful to say that a law belongs to such condemned class, that declares that it shall be a sufficient citation to a person sued, to deliver him a copy of the summons personally, or if not found to some white person of his family over the age of fourteen, at his dwelling house, or usual place of abode. Such a mode of service could scarcely, under any circumstances, be used as an instrument of fraud, and, in almost every instance, would effect its purpose of giving to the defendant the requisite information. In these cases the question is never whether the citation ordained by the foreign law is of a character to commend itself to the judgment, but it is whether, for the purpose for which it is designed, it is, in substance, entirely nugatory. Irregularities in the service of process must be objected to before the court in which such process is returnable, and, unless they are so radical as practically to strip the summons of all citatory efficacy, they cannot be allowed, in any jurisdiction, to have the effect of annulling the judgment. Any other rule than this would deprive the most solemn decisions of the highest courts of other States of all their legal value, when endeavored to be enforced extra-territorially; or when used in collateral actions to maintain rights dependent on such adjudications; virtually, they would be converted into mere matters *in pais*, altogether dependent on the statements which the party served with process might make with respect to possible informalities occurring at the time of the service of such process." No irregularity in the service of process unless such as deprived it of all citatory effect is available against the judgment ensuing upon such process.<sup>2</sup> So, where the record shows the service of a summons, actual or constructive, or where the judgment shows that the parties appeared, or that due notice was given, the judgment is conclusive until reversed or vacated

<sup>1</sup> Beasley, J., in *Jardine v. Reichert*, 89 N. J. L. 165.

<sup>2</sup> *Jardine v. Reichert*, 89 N. J. L. 165; *Murphy v. Winter*, 18 Ga. 690;

*Downer v. Shaw*, 23 N. H. 277; *Mowray v. Chase*, 100 Mass. 79; *Hale v. McComas*, 59 Tex. 484; *Harris v. McClannahan*, 11 Lea, 181.

by some direct proceeding. It cannot be assailed in a collateral proceeding, merely because the evidence of some of the preliminary steps to be taken in the inception of the action is not found on file.<sup>1</sup>

The doctrine is that the court where there is no appearance is bound to decide whether the defendant had legal notice of the pendency of the action,<sup>2</sup> before it can render a valid judgment.

§ 382. The rule applied by the majority of the Supreme court in the *Settlemeier* case is, we think, a wide departure from long established and well settled principles; without any reference to the long line of authorities, any number of which are cited in this work, and which it would be useless to repeat here, it has set aside principles so firmly imbedded in the law of fundamentals that they have never yet been questioned by any tribunal. The maxim, *Omnia praesumuntur rite et solemniter esse acta*, by this decision, has virtually no application to judgments of courts of general or superior jurisdiction. The decision in the *Settlemeier* case emanating from the highest tribunal in the Nation, much more time has been devoted in endeavoring to show its wide departure from principle than if the decision had been rendered by a State court, and its effect limited to that one State.

§ 383. The Supreme Court of the United States, by Mr. Justice Field, say: "It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgment it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject matter of the action in which the judg-

<sup>1</sup> *Farmer's Ins. Co. v. Highsmith*, 44 Iowa, 330; *Woodburry v. Maguire*, 42 Iowa, 339; *Lyon v. Vanatta*, 35 Iowa, 525.

<sup>2</sup> *Dowell v. Lahr*, 77 Ind. 146; *Reilly v. Lancaster*, 39 Cal. 354; *McCarsley v. Fulton*, 44 Cal. 354; *Krug v. Davis*, 89 Ind. 309; *Oppenheim v. Ry. Co.*, 85 Ind. 471; *Baird v. Hall*

70 Ind. 469; *Dequindie v. Williams*, 31 Ind. 444; *Spalding v. Baldwin*, 31 Ind. 376; *McAlpine v. Sweetzer*, 76 Ind. 78; *Helphenstine v. Bank*, 65 Ind. 582, S. C., 32 Am. R. 86; *Pressler v. Turner*, 57 Ind. 56; *Stout v. Woods*, 79 Ind. 108; *Hume v. Conduitt*, 76 Ind. 598; *Suelson v. State*, 16 Ind. 29; *Paris v. Reynolds* 70 Ind. 359.

ment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant or his appearance in the action. But when the former exists the latter will be presumed."

§ 384. "The presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer, or the proof of service contained in the record, that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so, it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the averment the necessary facts to support the judgment are presumed."

"The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law."

§ 385. "The tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial

limits; they cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy. 'The authority of every judicial tribunal, and the obligation to obey it, are circumscribed by the limits of the territory in which it is established.'<sup>1</sup> 'The courts of a State, however general may be their jurisdiction, are necessarily confined to the territorial limits of the State.' Their process cannot be executed beyond those limits; and any attempt to act upon persons or things beyond them would be deemed a usurpation of foreign sovereignty, not justified or acknowledged by the law of nations. Even the Court of King's Bench, in England, though a court of general jurisdiction, never imagined that it could serve process in Scotland, Ireland or the colonies, to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit. This results from the general principle that a court created within and for a particular territory is bounded in the exercise of its powers by the limits of such territory. It matters not whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extra-territorial; if the latter, then the judicial interpretation is, that the sovereign has chosen to assign this special limit, short of his general authority."<sup>2</sup> "Such is the familiar, reasonable and just principle of the law of nations: and it is scarcely supposable that the framers of the Constitution designed to abrogate it between States which were to remain as independent of each other, for all but national purposes, as they were before the Revolution. Certainly it was not intended to legitimate an assumption of extra-territorial jurisdiction which would confound all distinctive principles of separate sovereignty."<sup>3</sup>

§ 386. "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of

<sup>1</sup> Burge, Commentaries on Colonial and Foreign Law, 1044.

<sup>2</sup> Picquet v. Swan, 5 Mason, 40.

<sup>3</sup> Steel v. Smith, 7 W. & S. 451.

the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree.<sup>1</sup> It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.”

§ 387. “When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the State nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. It may be doubted if a case can be found which sanctions any interment of jurisdiction over the person of the defendant when the same is to be acquired by a special statutory mode without personal service of process. If jurisdiction of the person of the defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued.”

“But it is said that the court exercises the same functions and the same power whether the service be made upon the defendant personally or by publication, and that, therefore, the same presumption of jurisdiction should attend the judgment of the court in the one case as in the other. This reasoning would abolish the distinction in the presumptions of law when applied to the proceedings of a court of general jurisdiction, acting within the scope of its general powers, and when applied to its proceedings had under special statutory authority. And, indeed,

<sup>1</sup> Galpin v. Page, 18 Wall. 366; Osgood v. Blackmore, 59 Ill. 251; Bo'sford v. O'Connor, 57 Ill. 72; Beicher

v. Chambers, 53 Cal. 635.

<sup>2</sup> Jordan v. Giblein, 12 Cal. 100; Ricketson v. Richardson, 26 Cal. 149; McMinn v. Wheelan, 27 Cal. 300.

it is contended that there is no substantial ground for any distinction in such cases. The distinction, nevertheless, has long been made by courts of the highest character, both in this country and in England, and we had supposed that its existence was not open to discussion. However high the authority to whom a special statutory power is delegated, we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. This rule applies equally to an order of the Lord Chancellor as to any order of Petty Sessions.”

“The qualification here made, that the special powers conferred are not exercised according to the course of the common law, is important.” When the special powers conferred are brought into action according to the course of that law, that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers.<sup>4</sup> But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.”

§ 388. “The extent of the special jurisdiction and the conditions of its exercise over subjects or persons necessarily depend upon the terms in which the jurisdiction is granted, and not upon the rank of the court upon which it is conferred. Such jurisdiction is not, therefore, the less to be strictly pursued because the same court may possess over other subjects or other persons a more extended and general jurisdiction. The incon-

<sup>1</sup> Christie v. Unwin, 3 Perry & Davison, 208.

<sup>2</sup> Morse v. Presby, 25 N. H. 302

<sup>3</sup> Harvey v. Tyler, 2 Wall. 332.

<sup>4</sup> Galpin v. Page, 18 Wall. 366.

veniences which may occasionally result from this course of decision are more than compensated by the lesson which it teaches, that from whatever source power may come it will fail of effect when unaccompanied by right.”<sup>1</sup>

§ 389. Whenever a party seeks the aid of a court of justice to enforce his rights, and submits his case and objections to the decision of a court, and invites it to decide upon them, and makes no objection to the jurisdiction until after the court has heard and adjudicated, he is estopped from subsequently objecting to its decision and the proceedings taken thereon.<sup>2</sup> Thus, one who petitions a court for appointment as a guardian or administrator, and has acted as such, cannot, when sued, deny the power of the court to make the appointment.<sup>3</sup> So, where a party is served with notice to appear and defend an action commenced against him, and for defects in the service or irregularity a court would have no jurisdiction over him, and he appears and pleads to the merits, or files a motion for security for costs, he is estopped from afterwards questioning the jurisdiction of the court on the ground of the insufficiency of the writ. So, a general appearance by the defendant estops him from pleading any defect in the service. Thus, where a summons was served on the agent of a corporation, and by sending a copy through the post-office directed to the manager, secretary, etc., at the company's office, an appearance was entered for the company and judgment rendered against it. The judgment was held valid, and a plea alleging the absence of sufficient service is bad.<sup>4</sup> If a court has jurisdiction of the subject-matter, and a party has some privilege which exempts him from the jurisdiction, he may

<sup>1</sup> *Galpin v. Page*, 18 Wall. 366; *Pennyroy v. Neff*, 95 U. S. 714; *Belcher v. Chambers*, 53 Cal. 635; *Senichu v. Lowe*, 74 Ill. 274; *Grigsby v. Barr*, 14 Bush, 330; *Alverson v. Dennison*, 40 Mich. 179; *Mickey v. Stratton*, 5 Sawyer, 475; *Shepard v. Wright*, 59 How. Pr. 512.

<sup>2</sup> *Reg. v. Galop*, 29 L. J. Mc. 39; *Brown v. Haines*, 12 Ohio, 1; *Ela v.*

*McConnihe*, 35 N. H. 729; *Mandeville v. Mandeville*, 35 Ga. 243; *Stevenson v. Miller*, 2 Litt. 306.

<sup>3</sup> *Hines v. Mullins*, 25 Ga. 696; *Mandeville v. Mandeville*, 35 Ga. 243; *Harbin v. Bell*, 54 Ala. 389.

<sup>4</sup> *Dun v. Keegin*, 4 Ill. 292; *Ryan v. Driscoll*, 9 C. L. N. 196; *Center v. Gibney*, 71 Ill. 557; *Johnson v. Johnson*, 12 Bush, 485; *Sheehy v. Professional, &c. Co.*, 2 C. B. N. S. 211.

waive the privilege, and cannot thereafter question the judgment.<sup>1</sup>

§ 390. Judgments of any court may be impeached by strangers to them, for fraud or collusion, but the proposition as stated is subject to certain limitations, as it is only those strangers who, if the judgment is given full credit and effect, would be prejudiced in regard to some pre-existing right, who are permitted to set up such a defense. Defenses of the kind may be set up by such strangers. Hence the rule that whenever a judgment or decree is procured through the fraud of either of the parties, or by the collusion of both, for the purpose of defrauding some third person, such third person may escape from the injury thus attempted, by showing, even in a collateral proceeding, the fraud or collusion by which the judgment was obtained.<sup>2</sup> Third persons only, however, can set up such a defense. Neither the parties, nor those entitled to manage the cause or to appeal from the judgment, or their privies, are permitted to make such defense in any collateral issue.<sup>3</sup> Thus, a judgment may be impeached for the purpose of showing that it was procured by the debtor for the purpose of avoiding the operation of the Bankrupt Act. Evidence for that purpose is admissible to show—(1) That it was procured within four months prior to filing the petition in bankruptcy, and with a view of giving the plaintiff a preference over the other creditors. (2) That the debtor was insolvent at the time. (3) That the plaintiff had at the time reasonable cause to believe that the defendant was insolvent,

<sup>1</sup> *Harrison v. Rowan*, Pet. C. C. 484; *Oveistreet v. Brown*, 4 McCord, 79; *Cleveland v. Welsh*, 4 Mass. 593; *Campbell v. Cowdon*, Wright (O) 484. and see Post, Ch. XII., for numerous instances and cases.

<sup>2</sup> *Crosby v. Leng*, 12 East, 409; *Ins. Co. v. Wilson*, 34 N. Y. 275; *Hall v. Hamlin*, 2 Watts, 354; *Pond v. Makepeace*, 2 Met. 114; *Sidensparker v. Sidensparker*, 52 Me. 481.

<sup>3</sup> *Homer v. Fish*, 1 Pick. 435; *Railroad Co. v. Sparhawk*, 1 Allen, 448; *Atkinson v. Allen*, 11 Vt. 619; *Granger*

*v. Clark*, 23 Me. 128; *Hammond v. Wilder*, 23 Vt. 342; *Coit v. Haven*, 30 Conn. 190; *Hollister v. Abbott*, 31 N. H. 442; *Christmas v. Russell*, 5 Wall. 290; *Pick v. Woodbridge*, 3 Conn. 39; *Williams v. Martin*, 7 Ga. 378; *Hammond v. McBride*, 6 Ga. 178; *Smith v. Henderson*, 23 La. Ann. 649; *Greene v. Greene*, 2 Gray, 361; *Field v. Sanderson*, 34 Mo. 542; *Callahan v. Griswold*, 9 Mo. 784; *Townsend v. Kern*, 2 Watts, 180; *Smith v. Kern*, 26 Me. 411; *Mason v. Messenger*, 17 Iowa, 261; *Osborne v. Moss*, 7 Johns 161; *Mosely v. Mosely*, 15 N. Y. 384.

and that he procured the judgment to give the plaintiff such a preference.<sup>1</sup> Competent evidence is admissible to prove those facts, but a judgment is no more liable to collateral impeachment in proceedings under the Bankrupt Act, except for the purpose of showing that the judgment in question was designed as a means of avoiding the equal distribution of the debtor's estate among his creditors than it is to such impeachment in the courts where it was rendered.<sup>2</sup> A judgment on a demand allowed cannot be collaterally brought into question. No objection can be taken to it unless the want of jurisdiction appears on the face of the proceeding; its allowance, unless appealed from, is like a judgment *res adjudicata*, and such judgment cannot be questioned for error or irregularity. In Rhode Island the probate of a will by the proper probate court of the State is conclusive upon the question of the validity of a will to pass real estate. In Massachusetts it has been repeatedly held that if a court of probate assumes a power which has not been conferred upon it, or departs from the course prescribed by law in exercising the powers conferred upon it, its decree will not only be erroneous, but wholly destitute of validity, and may be treated as a nullity in any collateral proceeding in which the question arises,<sup>3</sup> and this seems to be the well-settled rule in all the States.

§ 391. It is a well settled principle of equity that fraud vitiates all transactions even the most solemn, and judgments are not beyond attack on this ground.<sup>4</sup> But judgments are impeachable for those frauds only which are *extrinsic* to the merits of the case, and by which the court has been imposed upon or misled into a false judgment. They are not impeachable for frauds relating to the merits between the parties. All mistakes and errors must be

<sup>1</sup> Buchanan v. Smith, 16 Wall. 277; Wager v. Hall, 16 Wall. 584; Shawhan v. Wherritt, 7 How. 644; Marshall v. Lamb, 5 A. & E. N. S. 126; Fernald v. Gray, 12 Cush. 596; Scammon v. Cole, 5 N. B. R. 257.

<sup>2</sup> Palmer v. Preston, 45 Vt. 154.

<sup>3</sup> Jenks v. Howland, 3 Gray, 536; Peters v. Peters, 8 Cush. 529.

<sup>4</sup> Nealis v. Dick, 72 Ind. 374; Queen v. Sadlers Co., 10 H. L. C. 404; Webster v. Reid, 11 How. 437; Clark v. Douglass, 62 Pa. St. 408; Carpentier v. Hart, 5 Cal. 406; Duchess of Kingston's Case, 20 How. St. 554; U. S. v. Throckmorton, 98 U. S. 61; Ross v. Wood, 70 N. Y. 8; Amador v. Mitchell, 59 Cal. 168.

corrected from within, by motion for a new trial, or to re-open the judgment, or by appeal. In the language of De Grey, Chief Justice, "If the judgment is a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from *within*, yet like all other acts of the highest judicial authority, it is impeachable from *without*. Although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an extrinsic collateral act, which vitiates the most solemn proceeding, of courts of justice." "The fraud," says the Court of Appeals of New York, "which will justify equitable interference in setting aside a judgment or decree, must be actual and positive, not merely constructive; it must be fraud occurring in the conception or procurement of the judgment or decree, which was not known to the party at the time, and for not knowing which he is not chargeable with negligence."<sup>2</sup>

§ 392. Judgments cannot be reviewed or defeated by a court of equity upon any suggestion that the court rendering such judgment misapprehended the law, or was mistaken as to the evidence before it, even if that consisted of fabricated papers supported by perjured testimony. When the very questions presented by a bill in equity (asking relief from such judgment) were necessarily involved in the proceedings before the court at law, and the credibility of the testimony offered was a matter there considered; thus, whether a deed, note or contract produced by the plaintiff was genuine, and the claim arising therefrom entitles the party to the relief demanded are the points at issue; the defendant denies the validity of the instrument sued upon, averring that the instrument was not executed by him, or that the plaintiff fraudulently obtained it, or any other defense, the gist of which is fraud. The *bona fides* of the transaction, the execution of the papers, or the fraud is the matter *sub judice*, cannot be established, and the relief asked for by the plaintiff granted him, except by evidence satisfactory to the court, that there was no one of the defenses set up, valid or sustained by proof. In such a case, the com-

<sup>1</sup> Duchess of Kingston's Case, 20 Howell's State Trials, 554.

<sup>2</sup> Ross v. Wood, 70 N. Y. 8; Amador v. Mitchell, 59 Cal. 168.

plainant cannot induce a court of equity to afford him the relief prayed for by his bill, by invoking the doctrine that fraud vitiates all transactions, even the most solemn, and that courts of equity will set aside or enjoin the enforcement of the most formal judgment when obtained by a fraud. "The doctrine of equity in this respect is not questioned; it is a doctrine of the highest value in the administration of justice, and its assertion in proper cases is essential to any remedial system adequate to the necessities of society, but it cannot be invoked to reopen a case in which the same matter has been once tried, or so put in issue between the parties that it might have been tried. The judgment rendered in such case is itself the highest evidence that the alleged fraud did not exist, and estops the parties from asserting the contrary. It is afterwards mere assumption to say that the fraud was perpetrated. The judgment has settled the matter otherwise; it is *res judicata*."

§ 393. The frauds for which a bill to set aside a judgment or a decree between the same parties, rendered by a court of competent jurisdiction, will be sustained, are those which are extrinsic or collateral to the matter tried, and not a fraud which was in issue in the former suit. The cases where such relief has been granted are those in which, by fraud or deception practiced upon the party seeking relief against the judgment or decree, he has been prevented from presenting all of his case to the court, by reason of which there has never been a real contest before the court of the subject matter of the suit.<sup>1</sup>

§ 394. All litigants are equally entitled to justice from the tribunals of the country; they have equally a right to an impartial judge; they can claim equal opportunities of producing their testimony and presenting their case, and they can equally have the advocacy of counsel. Whenever one party by any contrivance prevents his adversary from having this equality with him before the courts, he commits a fraud upon public justice, which, resulting in private injury, may be the ground of equitable relief against the judgment recovered. Thus, if, through his instrumentality, the witnesses of his adversary be forcibly detained from

<sup>1</sup> United States v. Throckmorton, 98 U. S. 61.

the court, or bribed to disobey its subpoena, or the testimony of his adversary be secreted or purloined, or if the citation to him be given under such circumstances as to defeat its purpose, a fraud is committed, for which relief will be granted by a court of equity, if it produce injury to the innocent party. Any conduct of the kind mentioned would tend to prevent a fair trial on the merits, and thus to deprive the innocent party of his rights. So, if a judge sit when disqualified from interest or consanguinity; if the litigation be collusive; if the parties be fictitious; if real parties affected are falsely stated to be before the court, the judgment recovered may be set aside, or its enforcement restrained, for in all these cases there would be the want of the judicial impartiality or the actual litigation which is essential to a valid judicial determination. To every such case the words of the jurist would be applicable; *fabula non iudicium, hoc est; in scena, non in foro, res agitur*. The credibility of testimony given in a case, bearing upon the issue, is not an extrinsic collateral act, but is a matter involved in the consideration of the merits; and the introduction of false testimony, known or shown to be so, does not affect the validity of the judgment rendered.”

§ 395. “In every litigated case where the interests involved are large there is generally conflicting evidence. Witnesses looking at the same transaction from different standpoints give different accounts of it. The statements of some are unconsciously affected by their wishes, hopes or prejudices. Some, from defective recollection, will blend what they themselves saw or heard with what they have received from the narration of others. Uncertainty as to the truth in a contested case will thus arise from the imperfection of human testimony. In addition to this source of uncertainty may be added the possibility of the perjury of witnesses and the fabrication of documents. The

<sup>1</sup> Hillsborough v. Nichols, 46 N. H. 379; Dunlap v. Glidden, 81 Me. 435; Eyles v. Sedgwick, Cro. Jac. 601; Lyford v. Demerit, 32 N. H. 234; McRae v. Mattoon, 13 Pick. 53; Greene v. Greene, 2 Gray, 361; Fuller v. Shattuck, 13 Gray, 70; Loring v.

Steinman, 1 Met. 204; Bateman v. Willoe, 1 Sch. & L. 204, Sparhawk v. Wills, 5 Gray, 423; Bigelow v. Winsor, 1 Gray, 301; Phillips v. Hunter, 2 H. Bl. 415, Christmas v. Russell, 7 Wall. 290; Michaels v. Post, 21 Wall. 398; Stevens v. Tuite, 104 Mass. 328; Acorn, The, 2 Abb. U. S. 445.

cupidity of some and the corruption of others may lead to the use of the culpable means of gaining a cause. "But every litigant enters upon the trial of a cause knowing not merely the uncertainty of human testimony when honestly given, but that, if he has an unscrupulous antagonist, he may have to encounter fraud of this character. He takes the chances of establishing his case by opposing testimony, and by subjecting his opponent's witnesses to the scrutiny of a certain cross examination. The case is not the less tried on its merits, and the judgment rendered is none the less conclusive, by reason of the false testimony produced. Thus, if an action be brought upon a promissory note, and issue be joined on its execution, and judgment go for the plaintiff, and there is no appeal, or if an appeal be taken and the judgment be affirmed, the judgment is conclusive between the parties, although, in fact, the note may have been forged and the witnesses who proved its execution may have committed perjury in their testimony. The rules of evidence, the cross examination of witnesses, and the fear of criminal prosecution with the production of counter-testimony, constitute the only security afforded by law to litigants in such cases. A court of equity could not afterward interfere upon an allegation of the forgery and false testimony, for that would be to re open the case to a trial upon the execution of the note, which had already been *sub judice* and passed into judgment. In all the cases extrinsic collateral acts of fraud will be found to constitute the grounds upon which a court of equity has acted. And on principle it must be so, for if the merits of a case could be a second time examined by a new suit, upon a suggestion of false testimony, documentary or oral, in the first case, there would be no end to litigation. The greater the interests involved in a suit the severer generally the contention; and in the majority of such cases the recovery of judgment would be the occasion of a new suit to vacate it or restrain its enforcement. If the present bill could be sustained upon the grounds alleged, and we should set aside the decree of the District Court, a new bill might years hence be filed to annul our judgment and re-instate the original decree on the same ground urged in this case, that fabricated papers and false testimony had been used before us, which eluded the scrutiny of the counsel and escaped our detection.

Of course, under such a system of procedure, the settlement of land titles in the State would be postponed indefinitely, and the industry and improvement which requires for their growth the assured possession of land, would be greatly paralyzed."

§ 396. "It is in effect contended that where a party has been forced to commence a suit to establish the genuineness of a document, and the suit is tried on that issue, his adversary may omit to bring forward proofs of its fraudulent character, which are in his own possession, and which, by reasonable diligence, he might have produced; and afterwards, when judgment has gone against him, may ask a court of equity to set aside that judgment and retry the same issue, *not* on the ground of newly discovered evidence, which could not by reasonable diligence have been procured, nor on the ground of fraud practiced in the course of the proceedings, but on the allegation that the document adjudged to be genuine, was in fact fraudulent, and that he believed in and was misled by the assertion of its genuineness made by his antagonist. And further, that this belief in the assertions of his adversary should excuse him for his laches in not producing proofs of the fraud in his own possession on the trial of the suit which he has himself compelled his adversary to bring to determine that very issue. A statement of this position is its own refutation. It is believed that a bill to set aside a final judgment and to obtain a new trial on such grounds, and with such an excuse for laches, would be dismissed by a court of equity without hesitation."

"But, conceding the jurisdiction, the matter is *res adjudicata* under the ordinary rules of law. The difficulty cannot be avoided by saying that the subject matter now involved is *fraud*, and fraud vitiates all proceedings; for the fraud relied on, when we come to the substance of the cases presented, consists in presenting and maintaining fraudulent grants, without disclosing the falsity of the claim to the adverse party; but that is the very fraud before in issue, litigated and determined, and not a fraud practiced upon the court in the course of the litigation, by which a real litigation was prevented, as distinguished from the fraud which was itself the subject matter of the litigation. If these bills can be maintained, it would be impossible to present a case, wherein a question of fraud constitutes the real question in issue

litigated between real parties before the court, and determined, to which the wholesome doctrine of *res adjudicata* would apply. Under such a rule, every case in which a false claim has been presented, and the question of genuineness litigated and adjudged, would be open to re-examination on the pretense of fraud, and there would be no end to litigation. If the principle maintained by the claimants can be extended to these cases, the doctrine of *res adjudicata* might as well be abolished."

§ 397. Fraud will not vitiate the estoppel of a judgment. Fraud vitiates the most solemn contracts, documents, and even judgments. Many rights originally founded in fraud become—by lapse of time, by the difficulty of proving the fraud, and by the protection which the law throws around rights once established by formal judicial proceedings in tribunals established by law, according to the methods of the law—no longer open to inquiry in the usual and ordinary methods. Of this class are judgments and decrees of a court deciding between parties before the court and subject to its jurisdiction, in a trial which has presented the claims of the parties, and where they have received the consideration of the court. There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, "*interest reipublice ut sit finis litium*," and "*nemo bis vexari pro una et eadem causa*."

If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, there is the same remedy by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. All these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So, in a suit in chancery, on proper showing a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. And if new evidence is discovered after the decree has become final, a bill of review on that ground may be filed, within the rules prescribed

by law on that subject. These proceedings are all part of the same suit, and the rule framed for the repose of society is not violated.

There is an exception to this rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing.<sup>1</sup>

The frauds for which courts of equity will interfere to set aside or stay the enforcement of a judgment of a court, having jurisdiction of the subject matter and the parties, must consist of extrinsic collateral acts, not involved in the consideration of the merits. They must be acts by which the successful party has prevented his adversary from presenting the merits of his case, or by which the jurisdiction of the court has been imposed upon. A decree may be avoided by showing that it was obtained by fraud. But this must be fraud in its concoction, such as corruption of the court, collusion between the parties, or other circumstances which would show, that what seemed a decree was in fact no decree; that it was *fabula non judicium*.<sup>2</sup> In a late case, where the question of fraud was before the court, the court said: "We have thought it right and due to the defendants to go through the allegations made against them; and their counsel, in fact, scarcely asked for any judgment, except one based on

<sup>1</sup> Pierce v. Olney, 20 Conn. 544; Weirick v. De Zory, 7 Ill. 388; Kent v. Richards, 3 Md. Ch. 396; Smith v.

Lowry, 1 Johns. Ch. 321; De Louis v. Meek, 2 Iowa, 55.

<sup>2</sup> United States v. Flint, U. S. Circ. Court.

their acquittal of the fraud charged against them. But we must not forget that there is a very grave general question of far more importance than the question between the parties to these suits. Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end, if a judgment obtained in an action fought out adversely between two litigants, *sui juris* and at arm's length, could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other willfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favor, the present defendants in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately *ad infinitum*. There is no distinction in principle between the old common law action and the old chancery suit, and the court ought to pause long before it establishes a precedent which would or might make in numberless cases judgments supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished, and punished severely; but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the court must not forget the evils which may arise from opening such new sources of litigation; amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods, and frauds." So, that the mischief of re-trying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife,

<sup>1</sup> Flower v. Lloyd, 8 C. L. J. 415.

than any compensation arising from doing justice in individual cases.

A court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented or considered in the judgment assailed. Thus, in a bill in chancery brought by an unsuccessful party to a suit at law, for a new trial, which was at that time a very common mode of obtaining a new trial, one of the grounds of the bill was that complainant had discovered since the trial was had that the principal witness against him was a partner in interest with the other side. The lord keeper said: "New matter may in some cases be ground for relief; but it must not be what was tried before; nor when it consists in swearing only, will I ever grant a new trial, unless it appears by deeds, or writing, or that a witness, on whose testimony the verdict was given, was convicted of perjury, or the jury attainted."<sup>1</sup> In another case, a bill was filed for a new trial on the ground that the witness, on whose testimony the amount of damages was fixed, was suborned by the plaintiff, and that complainant had learned since the trial that a fictitious sale of salt had been made for the purpose of enabling the witness to testify to the market price. Chancellor Kent said that complainant must have known, or he was bound to know, that the price of salt at the place of delivery would be a matter of inquiry at the trial, and he dismissed the bill for want of equity. Chancery will not interfere, though new evidence has been discovered since the trial, which, if the party could have introduced it, would have changed the result.<sup>2</sup> Equity never interferes to grant a trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction. The rule applies with equal force to a bill to set aside a decree in equity after it has become final, where the object is to re-try a matter which was in issue in the first case, and was matter of actual contest.<sup>3</sup>

<sup>1</sup> Tovey v. Young, 1 Pre, in Ch. 193.

<sup>2</sup> Smith v. Lowry, 1 Johns. Ch. 321.

<sup>3</sup> Bateman v. Willoe, 1 Sch. & L. 204;  
Dixon v. Graham, 16 Iowa, 310; Cot-

tle v. Cole, 20 Iowa, 484; Borland v.

Thornton, 12 Cal. 440; Riddle v.

Barker, 13 Cal. 295; Railroad Co. v  
Neal, 1 Woods C. C. 353.

In an able opinion<sup>1</sup> Chief Justice Shaw said in a case by a woman against her husband for a divorce: The husband had five years before obtained a decree of divorce against the wife, and in her bill she now alleges that the former decree was obtained by fraud and collusion and false testimony, and she prays that this may be inquired into, and that decree set aside. The court was of opinion that this allegation meant that the husband colluded or combined with other persons than complainant to obtain false testimony or otherwise to aid him in fraudulently obtaining the decree. The Chief Justice says that the court thinks the point settled against the complainant by authority, not specifically in regard to divorce, but generally as to the conclusiveness of judgments and decrees between the same parties. He then examines the authorities, English and American, and adds: "The maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud because the judgment is the highest evidence and cannot be contradicted." It is otherwise, he says, with a stranger to the judgment. This is said in a case where the bill was brought for the purpose of impeaching the decree directly, and not where it was offered in evidence collaterally. The decisions establish the doctrine, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, intrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered.

§ 398. If a judgment has been obtained upon a false or fictitious cause of action, it is not sufficient to avoid a judgment, that the party in whose favor it was rendered obtained it on false evidence; the issues must have been false, so that the foundation of the judgment is fraudulent. *Causa judicati in invitum non devocatur; nisi probare poteris eum qui judicaverat, secutus ejus instrumenti fidem quod falsum esse constiterit adversus te pronunciasse.* It is also essential that there should have

<sup>1</sup> Greene v. Greene, 2 Gray, 361.

been no contest as to the validity of the cause of action, for if that has been litigated, it is a question merged in the judgment, which is not to be renewed; but in order to render fraud a cause by which a judgment may be avoided, the party must avail himself of his right as soon as he discovers the fraud, or within the time fixed by law for bringing actions on the ground of fraud, or the statute of limitations will be an estoppel.

Statutes of limitation are vital to the welfare of society, and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.

In this class of cases the plaintiff is held to stringent rules of pleading and evidence, "and especially must there be distinct averments as to the time when the fraud, mistake or concealment was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, discovery might not have been before made."<sup>1</sup> "This is necessary to enable the defendant to meet the fraud and the time of its discovery."<sup>2</sup> A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner.<sup>3</sup> Whoever would complain of the proceedings of a court must do so in such time as not to injure his adversary by unnecessary delay in asserting his rights.<sup>4</sup> A mere allegation of fraud in general

<sup>1</sup> *Sterns v. Page*, 7 How. 829.

<sup>2</sup> *Betts v. Lewis*, 19 How. 72; *Baubien v. Baubier*, 23 How. 119; *Badger v. Badger*, 2 Wall. 95; *Stanley v. Stanley*, 36 Ind. 445; *Boyd v. Boyd*, 27 Ind. 429; *Buckner v. Calcote*, 28 Miss. 434; *Nudd v. Hamblin*, 8 Allen, 131;

*Cole v. McGlothing*, 9 Me. 131; *McKown v. Whittemore*, 31 Me. 448; *Rouse v. Southard*, 39 Me. 404; *Wynne v. Corneliuson*, 53 Ind. 312; *Wood v. Carpenter*, 99 U. S.

<sup>3</sup> *Carr v. Hilton*, 1 Curtis C. C. 220.

<sup>4</sup> *Voorhees v. Bank*, 10 Pet. 449; *Lyons v. Cooledge*, 89 Ill. 529.

terms, without stating the facts upon which the charge rests, is insufficient.<sup>1</sup>

§ 399. Where courts of law and equity have concurrent power, the court first applied to grants the relief which concludes against the second suit, and this is the rule with all tribunals of concurrent jurisdiction.<sup>2</sup> This principle is universally recognized in all cases of concurrent jurisdiction, as essential to the validity and dignity of judicial proceedings, the harmony of judicial action, and the prevention of unseemly conflicts between judicial tribunals, harassing and perplexing to the suitor—that the court which first has possession of the subject must decide it; and having adjudicated, the adjudication is conclusive. A party will not be aided by a court of chancery after a trial at law, unless he can impeach the justice of the verdict, on grounds of which he could not have availed himself at law, or unless he was prevented from doing so by fraud or accident, or the act of the opposite party, unmixed with negligence or fault on his part.<sup>3</sup>

<sup>1</sup> *J. Anson v. Stuart*, 1 T. R. 748; *Wallingford v. Society*, 5 App. Cas. 685 (34 Eng. Rep. 65); *Service v. Heermance*, 2 Johns. 96; *Brereton v. Hull*, 1 Denio, 75; *Weld v. Locke*, 18 N. H. 141; *Bell v. Lamprey*, 52 N. H. 41; *Phillips v. Potter*, 7 R. I. 289; *Sterling v. Ins. Co.*, 32 Pa. St. 75; *Giles v. Williams*, 3 Ala. 316; *Hynson v. Dunn*, 5 Ark. 395; *Hale v. Company*, 11 W. Va. 229; *Capuro v. Ins. Co.*, 39 Cal. 123; *Cole v. Opera House*, 79 Ill. 96.

<sup>2</sup> *Arrington v. Washington*, 14 Ark. 218; *Dunham v. Downer*, 31 Vt. 249; *Conine v. Scoby*, 2 South. 510; *Houston v. Royston*, 9 Miss. 238; *Tate v. Hunter*, 3 Strobb. Eq. 136; *Ingraham v. Dawson*, 20 How. 486; *Watson v. Jones*, 13 Wall. 679; *Buck v. Colbath*, 3 Wall. 334; *Le Guen v. Gouverneur*, 1 John. Cas. 505; *Newkirk v. Morris*, 12 N. J. Eq. 62; *Hendrickson v. Norcross*, 19 N. J. Eq. 417; *Derby v. Jacques*, 1 Cliff. 425; *Knox v. Wald*

*borough*, 5 Me. 185; *Miller v. Maus*, 29 Md. 191; *Morgan v. Bliss*, 2 Mass. 111; *Comins v. Tuck*, 20 Pick. 386; *Greely v. Smith*, 1 W. & M. 181; *Jones v. Howard*, 3 Allen, 223; *Marsh v. Hammond*, 11 Allen, 483; *Holland v. Hatch*, 15 Ohio S. 463; *Wheeler v. Ruckman*, 51 N. Y. 391; *Delaney v. Reade*, 4 Iowa, 292; *Rankin v. Barnes*, 5 Bu-h, 20; *Bouldin v. Reynolds*, 50 Md. 171; *Stearns v. Stearns*, 16 Mass. 171; *Bemis v. Stearns*, 16 Mass. 203; *State v. Yarborough*, 1 Hawks, 73; *Thompson v. Hill*, 3 Yerg. 167; *Hill v. Dana*, 2 Aik. 381; *Smith v. Melver*, 9 Wheat. 532; *Eaton v. Patterson*, 2 S. & P. 9; *The Robert Fulton*, Paine, 621; *R. R. Co. v. R. R. Co.*, 12 R. I. 220. But this rule applies only where actions brought in the two courts involve the same parties and the same subject-matter.

<sup>3</sup> *Dunham v. Downer*, 31 Vt. 249; *Brewer v. Cantillon*, 4 Johns. Ch. 85; *Orcutt v. Orvis*, 3 Paige, 459; *Triplett*

Thus where relief was sought against a judgment at law, not because of fraud in its rendition, but because the title on which the judgment was founded was infected by fraud, the argument addressed to the court was, that a court of equity had jurisdiction because of the fraud. The facts alleged had precisely the same operation in a court of law as in a court of equity, and were as capable of proof in the one court as in the other. Relief was refused, the court saying: "Admitting, then, the concurrent jurisdiction of the courts of equity and law in matters of fraud, we think the cause must be decided by the tribunal which first obtains possession of it, and that each court must respect the judgment or decree of the other. A question decided at law cannot be reviewed in a court of equity, without the suggestion of some equitable circumstance, of which the party could not avail himself at law." There must be an end to litigation; and without offending principles of public policy, endangering the order and peace of society, and deranging the whole structure of our judicial system, a court of equity cannot intervene against the decree or judgment of a court of competent jurisdiction because of facts known, or capable of discovery by reasonable inquiry, at the time of its rendition. Fraudulent practices or concealments may be resorted to by an unscrupulous suitor; witnesses may be corrupted, or evidence suppressed, and an unjust, unconscientious judgment wrested from the court; these must have been unknown, and reasonable diligence not sufficient to have guarded against them. "Were a court of equity, in a case of concurrent jurisdiction, to try a cause already tried at law, without the addition of any equitable circumstance to give jurisdiction, it would act as an appellate court, to affirm or reverse a judgment already rendered on the same circumstances by a competent tribunal. This is not the province of a court of chancery."<sup>1</sup> The principle, that matters which have received a judicial deter-

v. Gil, 7 J. J. Marsh 432; Teal v. Woodward, 3 Paige, 470; Baldwin v. McCrea, 38 Ga. 659; King v. Smith, 15 Ala. 270; Watts v. Gayle, 20 Ala. 626; Allman v. Owen, 31 Ala. 167; Moore v. Lessee, 33 Ala. 237; Duck-

work v. Duckworth, 35 Ala. 70; Otis Adm'r v. Dargan, 53 Ala. 178, Waring v. Lewis, 53 Ala. 515; Brooks v. O'Hara, 8 F. R. 529; U. S. v. Throckmorton, 98 U. S. 65; R. R. Co. v. Holbrook, 92 Ill. 297

<sup>1</sup> Smith v. McIver, 9 Wheat. 535.

mination cannot be called again into controversy by the same parties or their privies, is as obligatory in equity as at law. The adjudication may be founded in error, or may have wrought wrong or injustice; but some special cause for equitable interference—some cause of which the party complaining could not have had the benefit, when the judgment was rendered—must be shown, or the judgment will remain a positive bar to future litigation at law or in equity. The actual adjudication of any question is final, under all circumstances, unless corrected by some appellate tribunal, and is never subject to re-examination in any other than an appellate court, upon an issue of law or of fact; nor upon the sole ground that the former decision is contrary to equity or good conscience. It is always a condition precedent to the proper action of a court of equity, in interfering with a judgment or decree not before it upon appeal, that facts be disclosed, establishing that the matter now in the form of an adjudication is in truth, without any fault of the party seeking to avoid its effect, a determination in which he could not present his cause of action, or his ground of defense, as the case may be, to the consideration of the court. No tribunal of concurrent jurisdiction is invested with any power to review or set aside the proceedings of a co-ordinate tribunal, and unless there is some statutory power given to review the proceedings of a court, no matter how inferior its jurisdiction may be, its adjudications are final and binding on all courts, State or Federal. Thus the Supreme Court of a State has no power upon a petition for *habeas corpus*, to review the judgment even of a subordinate State court, exercising proper jurisdiction; but such judgment must be held valid until reversed on writ of error or appeal. With much stronger force does this principle apply to the interference of a State court with the judgment of a Federal court. And a State court can not issue a writ of *habeas corpus* on the petition of a party tried and sentenced by a Federal court, for an offense against the United States.<sup>1</sup>

§ 400. A decree in a court of chancery may be given in evidence, and upon the same basis as the judgment of a court of

<sup>1</sup> Williamson's Case, 26 Pa. St. 9; Robinson, in re, 6 McLean, 355.

common law.<sup>1</sup> An existing judgment or decree of a competent court is conclusive of the rights of parties on the same point in any other court of concurrent jurisdiction; nor do the decrees of a court of equity form any exception to the rule,<sup>2</sup> and this rule is applicable where the decree has been affirmed by an equally divided court.<sup>3</sup> A decree on a bill filed alleging payment of a note declaring that facts alleged in the bill as amounting to payment were not true, was held to be conclusive against evidence of the same facts, offered to show payment in a suit at law on the same note.<sup>4</sup> The common law rule, in respect to judgments, is equally applicable to decrees in chancery, that the order or decree is not evidence against strangers, but is confined in its operations to parties and privies. The decree and proceedings in chancery are equally admissible as a record at law to show *rem ipsam* though between strangers, and especially between privies. The regularity or error of the proceedings in the court of chancery, whether the matter was previously heard, is not the subject of inquiry,<sup>5</sup> nor is it impeachable for fraud while in force.<sup>6</sup> But jurisdiction is inquirable into, so that a decree may be good *in rem* as to a non-resident without notice, and void as to another party *in personam*. "By the *lex loci rei sitae* property belonging to a person who is not within the jurisdiction of a court of law or equity may be made subject to the jurisdiction of the court so as to render the judgment or decree of such court binding as a proceeding *in rem* against the property within its jurisdiction. But where the defendant or any party proceeded against does not reside in the State or county where the suit is brought, and is not served with process and does not appear, the judgment or decree in such suit will not be allowed to operate *in personam*."

<sup>1</sup> Hopkins v. Lee, 6 Wheat. 109; Smith v. Kernochen, 7 How. 198; Wilson v. Broughton, 50 Mo. 17; Phoebe Stuart, The, Ad. L. C. 63; McCamant v. Patterson, 39 Mo. 100; Hammond v. Davenport, 16 Ohio St. 177; McGregor v. McGregor, 21 Iowa, 441; Society v. Hartland, 2 Paine C. C. 536; San Francisco v. Spring Valley W. Works, 39 Cal. 473;

Babcock v. Camp, 12 Ohio S. 11; Campbell v. Ayres, 1 Iowa, 257; Watson v. Hopkins, 27 Tex. 637.

<sup>2</sup> Pearce v. Gray, 2 Y. & C. 322.

<sup>3</sup> Carleton v. Davis, 8 Allen, 94; Durant v. Essex Co., 7 Wall. 107.

<sup>4</sup> Sutherlin v. Mullis, 17 Ind. 19; Coit v. Tracy, 8 Conn. 276; Mathews v. Roberts, 29 N. J. Eq. 338.

<sup>5</sup> Bates v. Delavan, 5 Paige, 299.

<sup>6</sup> Peck v. Woodbridge, 3 Conn. 36

against such party in the courts of any other State, and in general the same principles are applicable to decrees in chancery as apply to all judgments of courts of law, a decree in chancery between the same parties proceeding upon the same substantial facts and grounds of equity is conclusive until reversed, and can never be impeached by an original bill in another suit,<sup>1</sup> and is a good plea in bar, and when given in evidence constitutes an estoppel in a subsequent suit.<sup>2</sup>

§ 401. Decrees bind and affect none others than the parties and their privies,<sup>3</sup> and no parties are bound by a decree without actual or constructive notice to them.<sup>4</sup> When, therefore, new parties are made to a suit in equity by amended or supplemental bill, decrees made in such suit before such amended bills were filed do not bind these new parties as *res adjudicata*; but they are open to any objection which might have been made prior to the rendition of such decrees.<sup>5</sup>

§ 402. An injunction issued by a State court was perpetuated by the decree of the Supreme Court of the State, a similar injunction was granted as between the same parties, with regard to the

<sup>1</sup> Maguire v. Taylor, 40 Mo. 406; French v. French, 8 Ohio, 214; Parish v. Ferris 2 Black, 606; Moody v. Harper, 30 Miss. 599; Hook v. Hood, 3 Miss. 867; Maguire v. Tylea, 40 Mo. 46; Evans v. Tatem, 9 S. & R. 261; Kelsey v. Murphy, 26 Pa. St. 78; Sibbald's Case, 12 Pet. 492; White v. Bank, &c., 6 Ohio, 529; Bank v. Beverly, 1 How. 148; Low v. Mussey, 41 Vt. 393; Starkie v. Woodward, 1 N. & Mc. 328; Murray v. Murray, 5 Johns. Ch. 60; Elliott v. Bell, 1 Paige, 262; Wendell v. Lewis, 6 Paige, 233; Astor v. Ward, 3 Edw. Ch. 371; Reybold v. Dodd, 1 Haring. 401; Estep v. Watkins, 1 Bland, 486; Contee v. Dawson, 2 Bland, 264; Strike v. McDonald, 2 Har. & G. 191; Gilchrist v. Gilchrist, 1 Dev. & Bat. Ch. 346; Kendrick v. Dallum, 2 Overton, 311; Thacker v.

Chambers, 5 Humph. 313; Prewett v. Prewett, 4 Bibb, 266; Cates v. Woodsoon, 2 Dana, 452; Prentice v. Buxton, 3 B. Mon. 35; Richardson v. Adams, 7 Miss. 311; Fischli v. Fischli, 1 Blackf. 360; Foster v. The Busteed, 100 Mass. 409; McDonald v. Ins. Co., 65 Ala. 358; McCally v. Robinson, 70 Ala. 432.

<sup>2</sup> Story v. Lee, 45 Ill. 277.

<sup>3</sup> Dearson v. Hyde, 6 Conn. 508; Brock v. Garret, 16 Ga. 487; Irvin v. Smith, 17 Ohio, 226; Yorks v. Steele, 50 Barb. 397.

<sup>4</sup> Chambers v. Warren, 6 B. Mon. 244; Klemm v. Dewes, 28 Ill. 317; Lawrence v. Rokes, 53 Me. 110.

<sup>5</sup> Stewart v. Duvall, 7 Gill & J. 179; Bugby v. Robinson, 19 Ala. 404; Loomis v. Francis, 17 Ill. 206; Burlen v. Quarrier, 16 W. Va. 156; Renick v. Ludington, 20 W. Va. 511.

same subject matter, in a new suit, by a court of the same State and if removed to a Federal court, the matter will be treated by the latter court as *res judicata*, and the injunction perpetuated.<sup>1</sup> But an injunction in chancery, or a decree determining that one of the parties is entitled to a conveyance of the subject matter in controversy from the other, cannot be pleaded or given in evidence as an estoppel, on the principle that to render a decision by one court conclusive against the right to seek redress in another, the matter involved must be substantially the same, which is not the case unless the jurisdiction of the former tribunal was sufficiently extensive to cover the whole ground brought before the latter. An adjudication on legal grounds in a court of law, will not necessarily preclude a re-examination of the subject in equity, and relief may be sought in an equitable proceeding against a judgment obtained by fraud, of such a nature that it could not have been set up as a defense to the action in which the judgment was obtained. When, however, a question falls within the exclusive or concurrent jurisdiction of equity, the decision will be conclusive in pleading and evidence at law.<sup>2</sup> Nor will a court of chancery review a decision of a court of law upon the same facts, or set aside or enjoin a judgment on the ground of error or mistake in the judgment of the court of law.

In determining what has been adjudged, courts will regard the decree, and in case of ambiguity, but not otherwise, be governed by an accompanying opinion; where it is free from ambiguity, it speaks for itself, and cannot be qualified by the opinion by which it may have been preceded.<sup>3</sup>

<sup>1</sup> Ry. Co. v. New Orleans, 14 Fed. R. 373.

<sup>2</sup> Houston v. Royston, 9 Mss. 238; Dwyer v. Goran, 29 Iowa, 126; Hempstead v. Conway, 6 Ark 317; Parker v. Kane, 22 How. 1; Sibbald v. U. S., 12 Pet. 192; Hopkins v. Lee, 6 Wheat 109; Ludlow v. Ramsey, 11 Wall. 581; Tarver v. Tarver, 9 Pet. 174; Kelsey v. Murphy, 26 Pa. St. 78; Evans v. Tatem, 9 S. & R. 261; Trescott v. Lewis, 12 La. 197; Paddock v. Palmer,

19 Vt. 581; Baker v. Morgan, 2 Dow, 526; De Riemer v. Cantillon, 4 Johns Ch. 85; McDonald v. McDonald, 1 Bail. 324, Shottenkirk v. Wheeler, 3 Johns. Ch. 279; Holmes v. Remsen, 7 Johns. Ch. 298; Coffin v. McCullough, 30 Ala. 107; Dunn v. Fish, 8 Blackf. 407; Reynolds v. Horine, 13 B. Mon. 234; Stockton v. Briggs, 5 Jones Eq. 304.

<sup>3</sup> Ry. Co. v. New Orleans, 14 Fed. R. 373; Phicque v. Ferret, 19 La. An. 318;

§ 403. A general dismissal of a bill may be pleaded in bar to a subsequent bill for relief on the same subject matter.<sup>1</sup> For the reason that a dismissal of a bill in chancery stands nearly on the same footing as a judgment for the defendant in an action at law, the presumption is that it was a final and conclusive adjudication upon the merits, whether they were or were not determined, unless the decree of the court proves that they were not determined, or that fact is apparent on the face of the decree.<sup>2</sup> Mere dismissal, however, without prejudice, is no bar, nor will a decision on summary application which goes off for want of notice or some other informality, bar a renewed application in proper form.<sup>3</sup> The dismissal of a libel for divorce in Massachusetts stands on the same grounds as a dismissal in equity.<sup>4</sup>

Keane v. Fisher, 10 La. Ann. 261; Wilcox v. Badger, 6 Ohio, 406; Trescott v. Lewis, 12 La. Ann. 197; Parrish v. Ferris, 1 Black, 606; Curtis v. Trustees, 6 J. J. Marsh. 536; Hepburn v. Dundas, 1 Wheat. 179; Blackinton v. Blackinton, 113 Mass. 231; Bigelow v. Winsor, 1 Gray, 299; Foote v. Gibbs, 1 Gray, 412; Durant v. Essex, 8 Allen, 103; S. C., 7 Wall. 107; Foster v. The Busted, 100 Mass. 409; Lewis v. Lewis, 106 Mass. 309; McDonald v. Ins. Co., 65 Ala. 358; Parkes v. Clift, 9 Lea, 524; Murdock v. Gaskill, 7 Baxt. 22; Case v. Beauregard, 101 U. S. 68; Phillips v. Wormley, 58 Miss. 398; State v. R. R. Co., 13 S. C. 290; Williams v. Hollingsworth, 5 Lea, 358; Black v. Black, 27 Geo. 40; Hall v. Dodge, 38 N. H. 346; Kelsey v. Murphy, 26 Pa. St. 78; Jenkins v. Johnston, 4 Jones Eq. 149; McCally v. Robinson, 70 Ala. 432; Mickles v. Thayer, 14 Allen, 122; Sayles v. Tibbitts, 5 R. I. 79; Pugh v. Holt, 27 Miss. 461; Estep v. Watkins, 1 Bland. 486; Low v. Mussey, 41 Vt. 393; Knight v. Atkinson, 2 Tenn. Ch. 384.

<sup>1</sup> Holmes v. Remsen, 7 John. Ch. 286; Danaher v. Prentiss, 20 Wis. 311; Bostwick v. Abbott, 40 Barb. 331; Holliday v. Coleman, 2 Munf. 162; Scully v. R. R. Co., 46 Iowa, 528; Curtis v. Trustees, 6 J. J. Marsh. 536; Collins v. Cave, 27 L. J. Exchq. 146; Thompson v. Clay, 3 Mon. 359; Pelton v. Mott, 11 Vt. 148; Wilcox v. Badger, 6 Ohio, 406; Trippall v. Burton, 27 Ark. 371.

<sup>2</sup> Jenkins v. Johnston, 4 Jones, 38; Louderback v. Collins, 4 Ohio S. 251; Borrowscale v. Tuttle, 5 Allen, 377; Ass. v. Reynolds, 5 Duer, 676; Perrine v. Dunn, 4 Johns. Ch. 140; Neafie v. Neafie, 7 Johns. Ch. 1; Lansing v. Russell, 13 Barb. 510; Munson v. Munson, 30 Conn. 425; Hall v. Dodge, 38 N. H. 346; Bank v. Walden, 7 La. Ann. 46; Whitman v. R. R. Co., 16 Gray, 530; Foote v. Gibbs, 1 Gray, 412; Ogsbury v. La Farge, 2 N. Y. 114; Byrne v. Frere, 2 Molloy, 157; Taylor v. Yarborough, 13 Gratt. 183;

<sup>3</sup> Blight v. McIlvoy, 4 Monroe, 142; Wheeler v. Ruckman, 51 N. Y. 391; O'Brien v. Browning, 49 How. P. 109; Thomas v. Hite, 5 B. Mon. 500.

<sup>4</sup> Thurston v. Thurston, 99 Mass. 39.

Thus where a bill, brought by taxpayers to enjoin county commissioners from issuing county bonds, is dismissed upon the merits of the case, the decree is a bar to an action in the name of the State, upon the relation of other taxpayers, against the commissioners and holders of the bonds, to have the bonds adjudged illegal and void.<sup>1</sup> So a decree that a bill in equity brought by executors of a husband's estate to enforce an antenuptial contract, whereby she upon a consideration "understood between the parties" renounced all claim on his estate, be dismissed, is conclusive evidence against the maintenance of their action at law against her for a breach of the contract.<sup>2</sup>

Thus where a creditor's bill on a final hearing had been dismissed, another action was commenced for the same cause, against the same parties, with the additional averment of the recovery of judgment and the return of an execution issued thereon, *nulla bona*, was held as *res judicata*, a bar to the suit.<sup>3</sup> So under bill filed by a married woman for the purpose of setting aside, as invalid, a mortgage executed by her, under authority of a special statute, a decree dismissing the bill, rendered on a demurrer, which went to the whole case, is conclusive as to the validity of the statute, and estops her from attacking it in a subsequent suit to foreclose the mortgage.<sup>4</sup> So, where, on a bill in equity, which does not disclose on its face any want of equity jurisdiction, an answer is filed denying the facts alleged and setting up other facts in defense, and on the issue so made the facts are found, and the bill dismissed on the ground that, on the facts so found, there appears to be adequate remedy at law, the finding of the facts is conclusive upon the parties and their privies, to the same extent that it would have been if the bill had been sustained. And where the bill is demurrable on the ground that upon its face there appears to be adequate remedy at law, but is otherwise sufficient, and no exception is taken to the jurisdiction by demurrer or otherwise, but the facts are put in issue by the answer, the respondent will be deemed to have admitted the jurisdiction of the court to inquire

<sup>1</sup> State v. R. R. Co., 13 S. C. 290.

<sup>2</sup> Case v. Beauregard, 101 U. S.

<sup>3</sup> Blackinton v. Blackinton, 113 688; Case v. R. R., 2 Woods, 236.

Mass 231; Durant v. Essex, 7 Wall.

<sup>4</sup> McDonald v. Ins. Co., 65 Ala. 358.

into the facts, and the finding of the facts will be conclusive upon him, although the bill be afterwards dismissed on the ground that there is adequate remedy at law.<sup>1</sup>

Where, in a prior suit between the same parties, founded on an infringement of the same patent, the prayer for relief was the same, and the issues the same, the present suit is barred by a decree of dismissal entered in the prior suit.<sup>2</sup> So where a bill filed by a purchaser of land at an administrator's sale, to have the title to land purchased by him confirmed by decree, on the ground of a mistake in omitting the description of the land in the petition of the administrator and the decree of sale, and to correct the mistake, is dismissed for want of equity, *the decree of dismissal will be a bar to a second bill in chancery by such purchaser seeking to recover of the estate the money paid for the land, and for taxes paid and improvements made by him upon the land before discovery of the mistake, and this though in the former bill another person, who had no interest in the subject matter involved, was joined as a co-complainant.*<sup>3</sup>

§ 404. The dismissal of a bill in chancery is not always conclusive of the complainant's right in a court of law, although the bill may have been filed for the same matter,<sup>4</sup> for if a complainant endeavors in a court of equity to enforce a strictly legal title, when his remedy is at law, the dismissal amounts to a declaration that he has no equity, and does not reflect upon his legal title—for as it concludes nothing, it can prove nothing; and if a decree in express terms professes to affirm a particular fact, if that fact is immaterial in the case, it will not estop the parties in relation to that fact.<sup>5</sup> But a decree dismissing a bill in any United States court is absolute, and constitutes a bar to any further litigation between the same parties upon the same subject matter, unless made because of some defect in the pleadings or for want of jurisdiction, or because the complainant has an adequate

<sup>1</sup> Brewster v. Colegrove, 46 Conn. 105; Munson v. Munson, 30 Conn. 425.

<sup>2</sup> Barker v. Stowe, 11 Fed. Rep. 303.

<sup>3</sup> Tilley v. Bridges, 105 Ill. 336.

<sup>4</sup> Wright v. Deklyen, 1 Pet. C. C. 198.

<sup>5</sup> Schindel v. Suman, 13 Md. 314; Hotchkiss v. Nichols, 3 Conn. 138; Coit v. Tracy, 8 Conn. 276; Beer, v. Fleming, 13 Ir. Com. L. 513; Griffin v. Seymour, 15 Iowa, 32.

remedy at law, or upon any other grounds which do not go to the merits, is a final determination. But where words of qualification are used, such as "without prejudice," or other terms indicative of a right or privilege to take further legal proceedings on the subject do not accompany the decree, the presumption is that it was dismissed on its merits.<sup>1</sup> This presumption is based upon the fact that where there are no words of qualification, as "without prejudice," the dismissal has been adjudged upon proper exceptions or other regular proceedings which brought into review the merits of the bill dismissed. The exception to this general rule is thus stated: "To be a bar to future proceedings, it must appear that the former judgment necessarily involved the determination of the same fact, to prove or disprove which it is offered in evidence. It is not enough that the question was in issue in the former suit. It must also appear to be precisely determined. Where in the answer various matters of defense are set forth, some of which relate to the maintenance of the suit, and others to the merits, and there is a general decree of bill dismissed, it is impossible to hold the decree a bar to future proceedings. This is because it is uncertain upon what ground the bill was dismissed."<sup>2</sup>

§ 405. The judgment of a court in actions for divorce where it has jurisdiction is, on a matter directly in issue, conclusive on the same matter between the same parties in another suit.<sup>3</sup> Thus

<sup>1</sup> Hughes v. U. S., 4 Wall. 232; Walden v. Bodly, 14 Pet. 156; Bigelow v. Winsor, 1 Gray, 299; Foote v. Gibbs, 1 Gray, 412; Perrine v. Dunn, 4 Johns. Ch. 140; Durant v. Essex Co., 7 Wall. 107; Cochrane v. Cowper, 2 Del. Ch. 77; Borrowscale v. Tuttle, 5 Allen, 377; Foster v. The Busted, 100 Mass. 409.

<sup>2</sup> Foster v. The Busted, 100 Mass. 409; Neafie v. Neafie, 7 Johns. Ch. 1; Peterborough v. Germain, 1 Bro.P.C. 281; Braldehyn v. Ord, 1 Atk. 571; Gardner v. Raisbeck, 28 N. J. Eq. 71; Prettyman v. Prettyman, 1 Vern. 310; Cater v. Dewar, Dick. 654.

<sup>3</sup> Sopwith v. Sopwith, 30 L. J. M. 131; Finney v. Finney, L. R. 1 P. & D. 480; Da Costa v. Villa Real, 2 Str. 961; Bunting's Case, 4 Co. 29; Kenn's Case, 7 Co. 42; Meadowcroft v. Hugenin, 4 Moo. P. C. 386; Perry v. Meadowcroft, 10 Beav. 122; Phillips v. Buyl, 2 T. R. 316; Prescott v. Fisher, 22 Ill. 390; Oades v. Oades, 6 Neb. 394; Hopper v. Hopper, 19 Ill. 219; Miltimore v. Miltimore, 40 Pa. St. 151; Norman v. Villars, L. R. 2 Exchq. D. 359; R. v. Wye, 7 A. & E. 761; Niboyet v. Niboyet, L. R. 4 P. D. 9; Ellis v. White, 61 Iowa, 644; Bunting v. Lepingwell, 2 Co. 355.

where a court, in granting a decree, adjudged that the husband should pay a sum of money in lieu of the wife's equitable estate, and divested her of such estate at the same time and vested it absolutely in the husband, she is estopped from subsequently asserting her title in equity to the land.<sup>1</sup> The principle that whatever might have been litigated under the issues is concluded by a judgment is applicable in actions for divorce. Thus, after a suit for divorce and alimony has been finally determined by the court granting the divorce, and in lieu of alimony confirming an executed agreement as to the amount paid as alimony, a new action for additional alimony cannot be maintained when the reasons for such additional allowance existed or might have been provided for in such final judgment, and when it is not sought to impeach such final judgment.<sup>2</sup> So, where a judgment for alimony was, by the decree in a divorce suit, made a special lien upon certain land belonging to the husband, to be enforced by execution upon default in the payment of the judgment. *Held*, that the husband could not set up as a defense that the land was his homestead, since he had failed to raise the question in the divorce suit.<sup>3</sup>

A divorce contemplates a final separation of the parties. Their paths in life henceforth diverge, and, in legal contemplation, they are to each other as strangers. When not otherwise provided, the law contemplates that, at the time of decreeing a divorce, the court will adjust all the pecuniary rights of the parties in relation to each other springing out of the marital relation about to be forever annulled. To this end, courts are given full discretionary authority to make such order concerning the division of the property and support of the children as to the courts shall appear, under all the facts and circumstances, just, equitable and reasonable.

When this discretionary power of the court, in allowing alimony, has been fully exercised in a case, it is ordinarily at an end—exhausted. So that, when once the court has allowed to

<sup>1</sup> Brooks v. Ankeny, 7 Oreg. 461.

<sup>2</sup> Fischli v. Fischli, 1 Blackf. 360;  
Petersine v. Thomas, 28 Ohio S. 596;

Hopper v. Hopper, 19 Ill. 219; Miltimore v. Miltimore, 40 Pa. St. 151;  
Oades v. Oades, 6 Neb. 304.

<sup>3</sup> Hemenway v. Wood, 53 Iowa, 21.

the wife what it considers just and equitable alimony in gross, and a divorce is at the same time granted, she will be deemed to have been allowed her just and equitable portion of her husband's estate. A court may, however, in the exercise of a sound discretion, grant the divorce, and make the alimony allowed payable in installments, and by continuing the alimony branch of the case, hold the parties and subject matter, by proper orders, so under its control as to increase or diminish the allowance as equitable circumstances and justice shall require. Judgment of divorce must be considered as final and conclusive between the parties. "Once granted, judgment of divorce, for obvious reasons of public policy, should, of all judgments, not be disturbed. Such is the policy of the law." So, where a wife obtained a decree of divorce, and seven years afterwards endeavored to avoid the decree for collusion and fraud, she was held bound by the judgment, having participated in its procurement.<sup>2</sup>

§ 406. A judgment against trustees or assignees who have sued for property embraced in the assignment, is binding upon the trustees and creditors, unless it can be shown to have been the result of fraud and collusion, when it may be set aside and canceled in equity. It is not every fraud which will be regarded as ground for avoiding the judgment, and when collusion is charged it must be satisfactorily proven before the court will interfere to afford relief.<sup>3</sup> The mere concealment of facts by either party to the suit, which might be beneficial to the other, has not been regarded as fraud.<sup>4</sup> To hold, therefore, that a judgment at law is reviewable in equity, simply because founded on false or exaggerated claims, would be virtually to hold that it is the right of the losing party, in almost any action tried on an issue of fact, to have it retried in equity, and would make the doctrine of *res adjudicata* comparatively nugatory. What is meant by fraud, as a ground for enjoining or setting aside a judgment, is not mere falsity of claim or proof, but fraud outside

<sup>1</sup> Campbell v. Campbell, 37 Wis. 206; Hopkins v. Hopkins, 40 Wis. 462.

<sup>2</sup> Miltimore v. Miltimore, 40 Pa. St. 151; Prescott v. Fisher, 22 Ill. 390.

<sup>3</sup> Field v. Flanders, 40 Ill. 470; Clemens v. Clemens, 28 Wis. 637; Hulberson v. Hutchinson, 28 Wis. 637.

<sup>4</sup> Field v. Flanders, 40 Ill. 470.

of them, perpetrated by some artifice or contrivance of the party or person benefited, or by some collusion of both parties, whereby, in the course of the trial, or in entering judgment, the injured party or the court has been imposed upon or betrayed into inattention and deceived.<sup>1</sup> For the repose of society, the ending of litigation and the security of titles to property, it is rendered imperative and necessary that stability should be given to the solemn adjudications of courts of justice. The law does not require parties to disclose facts in their knowledge beneficial to the other parties, unless required to discover by a bill, and such failure to do so is not of itself sufficient ground upon which to invoke the aid of a court of equity.<sup>2</sup> Where an equitable defense is presented, which might have been made the subject of an original bill, the defendant cannot, after verdict in favor of the plaintiff, present the same matters in equity as grounds for affirmative relief against the same plaintiff.<sup>3</sup>

§ 407. A party to a bill in equity is estopped by the decree, as to matters put in issue by the pleadings and settled by the decree.<sup>4</sup> When a fact has been directly tried and decided by a court of competent jurisdiction, it cannot be contested again between the same parties or their privies, in the same or any court. A judgment of a court of law or decree in chancery, is an estoppel to the parties thereto and their privies, provided it relates to the same subject matter, and decides the questions subsequently in issue. But if that question was before the court only collaterally, and incidentally considered, the judgment or decree is no estoppel. It cannot be ascertained by inference, or

<sup>1</sup> *Furbush v. Collingwood*, 13 R. I. 720, *Muscataine v. Railroad Co.*, 1 Dillon, 536; *Bateman v. Willoe*, 1 Sch. & Lef. 201; *Emerson v. Udall*, 13 Vt. 477.

<sup>2</sup> *Carr v. Miner*, 42 Ill. 179.

<sup>3</sup> *Terrell v. Higgs*, 1 De G. & J. 388; *Arnold v. Allmor*, 15 Grant Ch. 375.

<sup>4</sup> *Carr v. College*, 32 Ga. 190; *Crandell v. Gallup*, 12 Conn. 365;

*Gould v. Stanton*, 16 Conn. 12, *Thacker v. Chambers*, 5 Humph 313, *Willis v. Willis*, 59 Tenn 83, *Noyes v. Kem*, 94 Ill. 521; *Henderson v. Hill*, 64 Ga. 293; *Caldwell v. White*, 77 Mo. 471; *Wilson v. Boughton*, 50 Mo. 17; *Ashley v. Glasgow*, 7 Mo. 320; *Hill v. St. Louis*, 20 Mo. 584; *Caldwell v. Lockridge*, 9 Mo. 368, *Smith v. Best*, 42 Mo. 18; *Gordinier's Appeal*, 89 Pa. St. 528; *Taylor v. Ins. Co.*, 17 F. R. 566.

by arguing from the former judgment or decree, whether the question subsequently in issue was embraced therein.<sup>1</sup>

§ 408. In the application of this rule, the Supreme Court of the United States in a late case said : “ It is said that Corcoran and his co-trustees, the Canal Company and the State of Maryland, *were all defendants to that suit, and that as between them no issue was raised by the pleadings on this question, and no adversary proceedings were had.* The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, *and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed upon by its decree.* It is to be observed, also, that the very object of that suit was to determine the order of the distribution of the net revenue of the Canal Company, and that the Corcoran trustees were made defendants for no other purpose than that they might be bound by that decree, and, lastly, as the decree did undoubtedly dispose of that question, its conclusiveness cannot now be assailed collaterally, on a question of pleading, when it is clear that the issue was fairly made and was argued by Corcoran’s counsel, as is shown by the third head of their brief, made a part of this record by stipulation.”

And in conclusion the court say : “ It seems to us very clear that the question we are now called on to decide has been already decided by a court of competent jurisdiction which had before it the parties to the present suit ; that it was decided on an issue properly raised, to which issue both complainant and defendant here were parties, and in which the appellant here was actually heard by his own counsel ; and that it, therefore, falls

<sup>1</sup> Evans v. Burge, 11 Ga. 265 ; Tuffts, 57 Me. 417 ; Slade v. Slade, 58 Me. 157 ; Atkinson v. White, 60 Me. 396 ; Hill v. Morse, 34 Vt. 365 ; Cecil v. Cecil, 19 Md. 72 ; Abbe v. Goodwin, 7 Conn. 377 ; Kennedy v. Scovil, 14 Conn. 61 ; Boss v. Crum, 48 Iowa, 233.

within the salutary rule of law which makes such a decision final and conclusive between the parties."<sup>1</sup>

§ 409. Parties to a suit in a court of competent jurisdiction where they labor under no disability are bound by the determination of their rights if fairly before the tribunal; when they have been once adjudicated in a court having jurisdiction they cannot be again litigated. The object in making a person a party to a suit is to enable him to be heard and to assert his rights, if he fails to set them up that he may be concluded from again litigating them, as for instance: in a proceeding for partition by heirs, the widow was made a party; the petition alleged that she was entitled to dower, and the court adjudged it to her, commissioners were appointed to assign dower; they reported it could not be done and the court therefore decreed her a yearly allowance in lieu of dower and made it a lien upon the land. The lands were sold under the partition proceedings, subject to the payment of the annuity. The widow made no claim of homestead, and she was estopped from afterwards setting up a homestead right against the purchaser under the partition sale. Where an unmarried woman, the head of a family, capable of releasing the homestead, and occupying it, fails to assert her right, when a court is called upon to pass upon it, in a suit to which she is a party, she will be concluded. Where a person not under a disability is sued and the homestead is involved, it will be affected by any neglect to assert it, precisely as any other right.<sup>2</sup> And this principle applies to the children of the party who failed to claim the exemption.<sup>3</sup>

So parties who appear before the ordinary to contest the granting of a homestead are concluded by the judgment upon all questions which it is necessary for the applicant to prove, and upon all questions which the statute provides the creditors may make, but they are not concluded upon questions over which the ordinary has no jurisdiction, unless it appears that

<sup>1</sup> *Louis v. Brown*, 109 U. S. 167;  
*Corcoran v. Canal Co.*, 94 U. S. 741.

<sup>2</sup> *Young v. Babilon*, 91 Pa. St. 280;  
*Wright v. Dunning*, 46 Ill. 271.

<sup>3</sup> *Nichols v. Dibrell*, 61 Tex. 539.

they actually made such questions, and that such were in fact decided.<sup>1</sup>

§ 410. The conclusiveness of judgments of inferior courts in regard to matters of probate and partition, was stated to be, under statutes similar to those of New York;<sup>2</sup> that an actual partition or sale, under a judgment in partition, is effectual to bar the future contingent interests of persons not *in esse*, though no notice is published to bring in unknown parties, and though such future purchasers may take under a deed or will, and not as claimants to any party to the action, "and also independent of the statute; contingent remaindermen or persons taking under an executory devise, who may thereafter come into being, are bound by the judgment as being virtually represented by the parties to the action, in whom the present estate is vested." "A final judgment was entered whereby it was adjudged and decreed, that the report of the commissioners in partition, and all things therein contained, be ratified and confirmed; that the partition so made by the commissioners shall be final and absolute." "It is difficult to perceive any substantial reason, why this adjudication of the rights of all parties, should not be final and conclusive." The same court held,<sup>3</sup> "that a judgment in partition is binding upon the parties, if the court had jurisdiction," of them and the subject matter. Matters which have been once determined by judicial authority cannot be again drawn into controversy • as between the parties and their privies. A decree, with regard to the personal status of an individual, will be equally conclusive with a decision upon a right of property; and hence the removal or appointment of an administrator or guardian, or the adjudication on a question of descent or pedigree, will be binding not only in the proceedings where they take place but in every other in which the same matter is agitated; and it is equally well settled that it is immaterial in what manner the question is brought before the court if it be actually decided." "It is not essential to create an estoppel that matters should have been adjudicated in precise terms. It is sufficient if the substance was so decided.

<sup>1</sup> Harris v. Colquit, 44 Ga. 663.

<sup>2</sup> Blakely v. Culder, 15 N. Y.

<sup>3</sup> Clemens v. Clemens, 37 N. Y. 74. 617.

The estoppel extends beyond what appears on the face of the judgment to every allegation which was made on one side and denied on the other, and was at issue and determined in the course of the proceedings." The burden of proof is of course on those who rely on the estoppel, and they must show that the matter in controversy has already "been heard and determined, when, however, it has been made to appear with sufficient clearness that a transaction has undergone a judicial investigation, the presumption will be irresistible that the judgment covered the whole, so far as it was entire and indivisible; and cannot be overcome except by the clearest proof that no evidence was given as to that fact by the plaintiff, or that the defendant failed to take advantage of a defense that might have been made available."

§ 411. "The general rule on the subject is well known to be that a former judgment of the same court or a court of competent jurisdiction, directly upon the point in issue, is as a *plea* in bar, or as evidence conclusive between the same parties, or others claiming under them upon the same matter directly in question in a subsequent action or proceeding. Such judgment or determination is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have been litigating, and have had decided as incident to or essentially connected with the same subject matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and defense."<sup>1</sup> This court said that an allegation on record, upon which issue had

<sup>1</sup> Bellows v. Foisyth, 2 How. 183; Harris v. Harris, 36 Barb. 88; Cyphert v. McClure, 23 Pa. St. 195; Simes v. Zane, 48 Pa. St.; Kilheffer v. Herr, 17 S. & R. 319; Hardy v. Gholson, 26 Miss. 70.

<sup>2</sup> Harris v. Harris, 36 Barb. 88; Bruen v. Hone, 2 Barb. 586; Embury v. Connor, 3 N. Y. 511; Hare v. Baker, 5 N. Y. 351; Davis v. Talcot, 12 N. Y. 184; Hays v. Rees, 34 Barb. 156; Clemens v. Clemens, 37 N. Y. 74; McDowell v. McDowell, 1 Bail. 324; Babcock v. Camp, 12 Ohio

S. 11; Hyatt v. Bates, 35 Barb. 308; Bloodgood v. Gracey, 31 Ala. 575; Noble v. Cope, 50 Pa. St. 17; Voorhees v. Bank, 10 Pet. 419; Etheridge v. Osborn, 13 Wend. 399; Boston v. Haynes, 33 Cal. 31; Manly v. Kidd, 33 Miss. 141; Walker v. Chase, 53 Me. 258; Davis v. Brown, 94 U. S. 423; Tredway v. McDonald, 51 Iowa, 663; Howson v. Weeden, 77 Va. 704; Roberts, in re, 19 S. C. 150; Foust v. Bellows, 59 N. H. 229; Hoover v. York, 35 La. An. 573; Buckingham v. Ludlum, 37 N. J. E. 137.

been once taken and found, and a judgment had been rendered, is between the parties taking it and their privies, conclusive according to the finding thereof, so as to estop the parties respectively, from again litigating that fact once so tried and found, whether pleaded in bar or given in evidence. "It follows that the judgment of a court of competent jurisdiction in a suit in which all the parties interested in the subject matter of the litigation being parties to the suit and their rights are declared, was *res adjudicata*."<sup>1</sup> The same court decided,<sup>2</sup> that where a plaintiff had, in a former action, recovered damages for injuries to his land, caused by flooding the same, the same causes continuing and the same damages to the plaintiff as a result, in a subsequent action accruing, the defendant will be estopped from denying damages as a result from the continuing cause of such damage as a matter of law; a former recovery for injuries sustained by the same plaintiff from the same cause, establishes the right to recover damages subsequently sustained from the same cause; but this was on the ground that the plaintiff could not recover prospective damages.

§ 412. As has been repeatedly stated, the verdict and judgment in any case is admissible to prove the fact that the judgment was rendered on the verdict given. There is a vast difference between proving the existence and its effect, and using a record as a means of proving any fact recited in it. In regard to proving the existence of a judgment or decree, it is never regarded as *res inter alios acta*, it being a public transaction rendered by public authority. The presumption is, that it is faithfully and truly recorded, and this presumption is so conclusive, that the only proper and legal manner in which its own existence can be substantiated, and the legal consequences resulting from its rendition can be shown is by its being produced in any tribunal where it is attempted to be used, no matter who the parties are

<sup>1</sup> Lynch v. Swanton, 53 Me. 100; 36; Clements v. Clements, 37 N. Y. Whitman v. Henneberry, 73 Ill. 109; 75; Love v. Waltz, 7 Cal. 250.  
Bruner v. Ramsburg, 43 Md. 560; <sup>2</sup> Plate v. R. R., 17 N. Y. 472;  
Roberts v. Percival, 18 C. B. N. S. Bowyer v. Schwefeldt, 1 Abb. App. 177.

in the action.<sup>1</sup> Thus, if a party acquitted of assault and battery for which he has been indicted, brings an action for malicious prosecution, the record is evidence for the plaintiff to establish the fact of his acquittal,<sup>2</sup> notwithstanding the parties are not the same, for in one case the State would be the plaintiff and the other party defendant, and in the civil action it would be between two parties for another and different action.<sup>3</sup> But it is directly the converse of this if the party is convicted, and he is then sued in trespass for the assault. The record in the action for assault can not be used in the subsequent action for trespass as evidence to establish the assault as to the matter in litigation; in trespass, as to that action, it is *res inter alios acta*. Thus, the judgment against a sheriff for the misconduct of his deputy is evidence against the deputy that the sheriff has been compelled to pay the amount awarded, and for the cause averred, but it is not evidence against the deputy of his misconduct unless he was notified of the suit and required to defend.<sup>4</sup>

§ 413. It may, therefore, be stated as a general rule that while a verdict and judgment in a criminal case may be and is admissible and conclusive evidence in regard to its own rendition, it cannot be used in a civil action to establish the fact upon which it was rendered.<sup>5</sup> For the obvious reason that the party may have been convicted upon the evidence of the very plaintiff in the civil action; if acquitted it may have been by collusion with the prosecutor. There is no mutuality; the parties are not the same. Estoppels should be reciprocal;<sup>6</sup> neither is the manner of proceeding the same, nor can the defendant in the criminal action avail himself of any admission the plaintiff in the civil action might make; and the jury in the criminal trial must be satisfied of the party's guilt, while in the civil action the verdict is rendered generally on the mere preponderance of evi-

<sup>1</sup> Ansley v. Carlos, 9 Ala. 973; Maple v. Beach, 43 Ind. 51.

<sup>2</sup> Caddy v. Barlow, 1 M. & R. 277; Basby v. Mathews, L. R. 2 C. P. 684; Arundell v. Tregon, Yelv. 116; Leggatt v. Tollewey, 14 East, 301.

<sup>3</sup> Leggatt v. Tollewey, 14 East, 302;

Jordan v. Lewis, 2 Stra. 1122.

<sup>4</sup> Tyler v. Ulman, 12 Mass. 66.

<sup>5</sup> Mead v. Boston, 3 Cush. 404; State v. Hoggard, 12 Minn. 167.

<sup>6</sup> Gibson v. McCarthy, Cas. T. Hard. 311; Towsley v. Johnson, 1 Neb. 95; Corbley v. Wilson, 71 Ill. 209.

dence, and for these same reasons it must be clearly apparent that a judgment in a civil action cannot be used in a criminal proceeding.<sup>1</sup> Thus the record of the trial and acquittal of a person upon indictment for a crime is not competent evidence of his innocence to meet a plea of justification interposed in an action by him of slander, in charging him with the same crime. As the defendant in the slander suit was not a party to the proceedings on the indictment, which were between the people and the accused, he is not bound by the result.<sup>2</sup> In a criminal prosecution for the removal of a fence from land, a judgment in a civil action, between the defendant and the prosecuting witness, rendered before the commission of the alleged trespass, whereby the disputed boundary line was defined and settled, is admissible in evidence, and the effect of such judgment was to establish the boundary line, and to exclude inquiry into antecedent facts to the contrary.<sup>3</sup> But a conviction and sentence by a U. S. district court of one charged with crimes, is conclusive on every other tribunal.<sup>4</sup> "A judgment in an English court is not conclusive as to anything but the point decided, and, therefore, a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged."<sup>5</sup> A record that is *res inter alios acta* is admissible in an action against a sheriff for neglect in regard to an execution, or to show the testimony of a former trial, or when the judgment constitutes one of the muniments of the party's title to an estate, as where a deed was made under a decree in chancery, or a sale was made by the sheriff under an execution, or where the recovery of a judgment operates to change or create a title, and it is on this principle that decisions of admiralty and prize courts are admissible as they transfer property.<sup>6</sup> So, in Pennsylvania, by recovering a

<sup>1</sup> *Rex v. Boston*, 4 East, 572; *Jones v. White*, 1 Stra. 68.

<sup>2</sup> *Corbley v. Wilson*, 71 Ill. 209.

<sup>3</sup> *Dorrell v. State*, 83 Ind. 357.

<sup>4</sup> *Ableman v. Booth*, 21 How. 506.

<sup>5</sup> *Castrique v. Imrie*, L. R. 4 Eng. & Ir. App. 434.

<sup>6</sup> *Barney v. Patterson*, 6 H. & J. 182; *Taylor v. Phelps*, 1 H. & J. 192; *Baylor v. De Jarnett*, 13 Gratt. 172; *Sidensparker v. Sidensparker*, 52 Me. 481; *Inman v. Mead*, 97 Mass. 310; *Secrist v. Green*, 3 Wall. 744; *Casler v. Shipman*, 35 N.Y. 533; *Cau-*

judgment in trespass, for carrying away goods, the plaintiff's property in them becomes divested, and consequently such judgment is admissible in favor of a stranger, who is subsequently sued in assumpsit by the same plaintiff for the proceeds or price of the goods.<sup>1</sup>

§ 414. In the statement of the doctrine of estoppel by matter of record or *res judicata* we have attempted to show the principles upon which the doctrine is founded and have examined it solely as to causes of a civil nature or judgments in the larger class, *civil actions*. The doctrine applies in criminal actions, and is one of the most important as well as one of the highest constitutional rights guaranteed to every citizen of the civilized world. That no man shall twice be punished by judicial judgments for the same offense. This principle is well settled in England and America, and is part of the organic law of each one of the United States as well as the Federal Constitution. The constitutional provision that "no person shall be subject for the same offense to be twice put in jeopardy of life or limb," is equivalent to the declaration of the common law principle that no man shall be twice punished for the same crime or misdemeanor. This principle may be stated thus: a regular conviction or acquittal upon a sufficient indictment is a good plea in bar to a subsequent prosecution for the same offense.<sup>2</sup> So that whenever it is made to appear substantially, by the record of a trial, that the defendant has been tried and acquitted, by a court of competent jurisdiction, for the same offense, the second prosecution must be barred.<sup>3</sup> The same rule applies whenever the proceedings operate as an acquittal.<sup>4</sup>

dee v. Lord, 3 N. Y. 269; Voorhees v. Seymour, 26 Barb. 569; Chamberlain v. Carlisle, 26 N. H. 540.

<sup>1</sup> Floyd v. Brown, 1 Rawle, 122; Marsh v. Pier, 4 Rawle, 273.

<sup>2</sup> Leslie v. State, 18 Ohio S. 390; State v. Lee, 10 R. 1. 494; State v. Degraffenreid, 9 Baxt. 287; State v. George, 53 Ind. 434; State v. Abrams, 6 Iowa, 117; State v. Walters, 16 La. Ann. 400; Leavenworth v. Tomlinson, 1 Root, 436; McCauley v. State, 26 Ala. 135;

Commonwealth v. Hawkins, 11 Bush, 603.

<sup>3</sup> Day v. Commonwealth, 23 Gratt. 915; Britton v. State, 54 Ind. 535; State v. George, 53 Ind. 434; State v. Brown, 16 Conn. 54; Stevens v. Pusssett, 27 Me. 266; Commonwealth v. Goddard, 13 Mass. 457.

<sup>4</sup> State v. Calender, 8 Iowa, 288; Grogan v. State, 44 Ala. 9; Jones v. State, 55 Ga. 625; People v. Bruzzo, 24 Cal. 41.

§ 415. If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense. The principle finds expression in more than one form in the maxims of the common law. In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et eadem causa*. It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action. In the criminal law the same principle is thus stated, "*Nemo bis punitur pro eodem delicto*,"<sup>1</sup> or, according to Coke, "*Nemo debet bis puniri pro uno delicto*."<sup>2</sup> No one can be twice punished for the same crime or misdemeanor. Blackstone in his Commentaries<sup>3</sup> cites the same maxim as the reason why, if a person has been found guilty of manslaughter on an indictment, and has had benefit of clergy, and *suffered the judgment of the law*, he cannot afterwards be appealed. If there had been no punishment the appeal would lie, and the party would be subject to the danger of another form of trial. But by reason of this universal principle, that no person shall be twice *punished* for the same offense, that ancient right of appeal was gone when the punishment had once been suffered. The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial. The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in

<sup>1</sup> Hawkins Pleas of the Crown, 377.

<sup>2</sup> 4 Co. 43; 11 Id. 95.

<sup>3</sup> Vol. 4, 315, Sharswood's edition

the former trial he had been acquitted or convicted. Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defense.

Every person acquainted with the history of governments must know that State trials have been employed as a formidable engine in the hands of a dominant administration. To prevent this mischief, the ancient common law, as well as Magna Charta itself, provided that but one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict*. To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of enacting the clause in question.<sup>1</sup> In a case<sup>2</sup> where the prisoner had been indicted, tried, and convicted of arson, while still in custody under this proceeding he was arraigned on an indictment for the murder of two persons who were in the house when it was burned. To this he pleaded the former conviction in bar, and the court held it a good plea. Punishment for arson can not technically extend either to life or limb; but the court founded its argument on the provision of the constitution of New Jersey. After referring to the common law maxim, the court says: "The constitution of New Jersey declares this important principle in this form: 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. But the framers of our Constitution have thought it worthy of especial notice. And all who are conversant with courts of justice must be satisfied that this great principle forms one of the strong bulwarks of liberty. Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict*." These pleas depend upon the principle that no man shall more than once be placed in peril of legal penalties upon the same accusation.

<sup>1</sup> Commonwealth v. Olds, 5 Litt. 137.    <sup>2</sup> Cooper v. State, 13 N. J. L. 361.

§ 416. But it is not necessary that the charges in the two indictments should be precisely the same; it is sufficient if an acquittal from the offense charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree. Thus, an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter, and the *converse* an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder.<sup>1</sup> Where there is but one count in an indictment, on which the accused may be convicted of one of several offenses which are covered by the indictment, the verdict of the jury finding the accused guilty of one of the said offenses is a verdict of acquittal of all the others of a higher grade of offense.

§ 417. It is held by many courts that if the accused applies for and obtains a new trial, he does not thereby waive the advantage of the acquittal thus obtained; he can only be tried again for the offense for which he was convicted.<sup>2</sup> It has been other-

<sup>1</sup> Commonwealth v. Griffin, 21 Pick. 523; Cameron v. State, 13 Ark. 712; Carpenter v. State, 23 Ala. 84; Clark v. State, 12 Ga. 131; Barnett v. People, 54 Ill. 325; Bremer v. People, 15 Ill. 511; Dinkey v. Commonwealth, 17 Pa. St. 126; Francisco v. State, 24 N. J. L. 30; Hurt v. State, 25 Miss. 378; Johnson v. State, 14 Ga. 253; Jordan v. State, 22 Ga. 545; People v. McGowan, 17 Wend. 386; People v. Smith, 57 Barb. 56; People v. Loop, 3 Park C. 561; People v. Gilmore, 4 Cal. 376; Lohman v. People, 1 N. Y. 379; Livingstone's Case, 14 Gratt. 492; R. v. Oliver, 8 Cox C. C. 287; R. v. Barnett, 9 C. & P. 387; R. v. Yeadon, 9 Cox C. C. 91; Rolls v. State, 52 Miss. 391; Reynolds v. State, 11 Tex. 120; Res. v. Roberts, 2 Dill. 124; People v. Apger, 35 Cal. 389; State v. Hardy, 47 N. H. 538; State v. Coy, 2 Aik. 181; State v. Reed, 40 Vt. 603; State v. Johnson, 10 N. J. L. 185; State v.

Stedman, 7 Port. 495; State v. Robey, 8 Nev. 312; State v. Cooper, 1 Green. 361; State v. Reed, 12 Md. 263; State v. Lewis, 2 Hawks, 98; State v. Cowell, 4 Ind. 231; State v. Lessing, 16 Minn. 80; State v. Smith, 15 Mo. 550; State v. Keogh, 13 Ia. Ann. 243; State v. Shepherd, 9 Conn. 54; State v. Ross, 29 Mo. 32; State v. Martin, 30 Wis. 216; State v. Taylor, 3 Oreg. 10; State v. Dearborn, 54 Me. 442; State v. Waters, 39 Me. 54; Stewart v. State, 5 Ohio, 242; Swinney v. State, 16 Miss. 576; Slaughter v. State, 6 Humph. 410; Wilcox v. State, 31 Tex. 586.

<sup>2</sup> Stuart v. Commonwealth, 28 Gratt. 950; Slaughter v. State, 6 Humph. 410; People v. Gilmore, 4 Cal. 376; Jordan v. State, 22 Ga. 545; Barnett v. People, 54 Ill. 325; State v. Tweedy, 11 Iowa, 350; State v. Ross, 29 Mo. 32; State v. Martin, 30 Wis. 216; Hurt v. State, 25 Miss. 378.

wise held, upon sound principle, that such new trial leaves the case as it was originally, and that the jury may find the defendant guilty of the greater offense. Thus, it was said, by Judge Grier, in addressing the prisoners, on a motion for a new trial, after having been convicted of manslaughter: "But let me now solemnly warn you to consider well the choice you shall make. Another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeit to the law. If you choose to run this risk, and again put your lives in jeopardy, it must be by your own act and choice. being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record, the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you."<sup>1</sup> While many courts have taken the latter to be the true rule, it is stated by Wharton,<sup>2</sup> that where the major and minor offenses are before the jury, a conviction of the minor is an acquittal of the major. As for example, a conviction for assault and battery will be a complete bar to an indictment for assault with intent to murder.<sup>3</sup> While this is undeniable where the verdict is allowed to stand, it seems on principle that if the defendant is permitted to have a new trial before a new jury, upon the same or additional evidence, in the hope of an acquittal, the State should be allowed the same latitude, and obtain a conviction upon the original indictment, as the party voluntarily places himself in the same position he occupied before the trial in the first action, thus waiving the constitutional right of being twice tried or jeopardized for the same offense. In a late case in Iowa, the question was raised as to the validity of a conviction by a jury of eleven. The constitution provides that the right to trial by jury shall remain inviolate; it was said that the jury contemplated should consist of twelve men. Yet the Supreme Court held that a constitutional provision might be waived by the defendant by consent of the State, and such a verdict would be binding. If one provision may be waived, another may, and there can be no question but that a new trial in a civil case leaves the cause as

<sup>1</sup> U. S. v. Harding, 1 Wall. Jr. 147;  
State v. Reihmer, 20 Ohio S. 519.

<sup>2</sup> § 550, 7th Ed. Crim. Law.

<sup>3</sup> Moore v. State, 71 Ala. 307.

though never tried; and if a judgment is rendered in favor of the defendant, he can not prevent the plaintiff from recovering the full amount sued for, if he can maintain his action. Why a new trial in a criminal case should give a defendant any greater rights than one in a civil cause is not easy to ascertain on principle; if the entire matter is to be tried *de novo* the jury should be the exclusive judges of the extent of the offense. The law protects the defendant if he desires to be protected, and if he, with knowledge of his rights, seeks another trial, he should be informed of his rights and the danger of a new trial; if he then demands it as his right and obtains its benefits, he should understand that he takes it *cum onere*, and that he is to be placed in the subsequent trial before a jury upon the same indictment, and that he has waived the acquittal of the major offense which the conviction of the minor one necessarily implies. While the doctrine that the conviction of the minor is an acquittal of the major is plausible, it is neither a conviction or acquittal if a new trial is granted; it is an absolute nullity, void for all purposes, unless the rule first stated should be maintained as correct. The remarks of Judge Grier are, on principle, correct, and if the State is to be burdened with the expense of repeated trials in order to vindicate the law, there should be no greater benefit conferred on one of the parties than on the other; each should stand upon the same footing. If the defendant is accorded a new trial to obtain an acquittal upon the same charge the State should have the like opportunity to convict it. It is far better to submit the whole matter to a jury than for a court to acquit a party of an offense by granting him a new trial, and for each succeeding verdict to lessen the degree of the crime with which he is charged. The whole question seems to be one of waiver or election, and there can be no reason why a party, with full knowledge of his rights, should not be bound by his election in a criminal as well as in civil case. With skilled counsel and an impartial and able court, there is no question but what the defendant's life and liberty will be fully and legally protected. This rule cannot be applied by a court where the statute provides the contrary doctrine.

§ 418. The record of an acquittal or conviction upon a crim-

inal charge is generally pleadable in bar, or conclusive evidence upon another indictment or other proceeding for the same offense. The parties are the same in both, and no one ought to be put in jeopardy twice for the same offense. Upon this ground it has been held that a person tried and acquitted by a competent tribunal, though in a foreign country, could not be tried again for the same offense,<sup>1</sup> unless it were done for the purpose of defeating justice and in fraud of the rightful sovereignty.<sup>2</sup> A judgment in a criminal proceeding is in the nature of a judgment *in rem*; such a judgment standing unreversed is conclusive evidence as to all its consequences, though there are some limitations to its conclusive effect. Thus, while an accessory to a felony, notwithstanding the judgment against his principal, is entitled to controvert his guilt, it is only *prima facie* evidence. But this is perhaps the only case where a judgment founded on a verdict is not conclusive as to the attainder of the principal. For a judgment in a criminal matter, so far as it regards all the consequences of the judgment, is binding upon all; the attainder of a criminal is, so long as it remains in force, conclusive upon all claiming from or through the party attainted. So a fine imposed for a breach of the peace is a legal bar to a subsequent indictment of the same party for the same act.<sup>3</sup> So a conviction on an indictment for conspiring with distillers to defraud the internal revenue is a bar to a civil action for a penalty, founded on the same acts of the accused; and so also is a pardon for the criminal offense.<sup>4</sup>

§ 419. The question frequently arises, what is jeopardy, so as to prevent a second trial for the same offense? and from the vast number of decisions upon questions pertinent to this inquiry, it would seem to be readily settled; but from the reasoning of courts in deciding cases it is as difficult of solution upon any settled principle as almost any new proposition in the science of juris-

<sup>1</sup> *Hutchinson's Case*, 1 Show 6; *R. v. Roche*, 1 Leach, 134.

<sup>2</sup> *State v. Little*, 1 N. H. 268; *State v. Brown*, 16 Conn. 54; *Bulson v. People*, 31 Ill. 409; *State v. Green*, 16 Ia.

239; *State v. Cole*, 48 Mo. 98; *Commonwealth v. Jackson*, 2 Va. Cas. 501.

<sup>3</sup> *Commonwealth v. Foster*, 3 Met. Ky. 1, *Commonwealth v. Hawkins*, 11 Bush, 703.

<sup>4</sup> *U. S. v. McKee*, 4 Dill. 128.

prudence. Without an extensive research into the field of criminal law, which occupies many volumes of text-books and reports, we shall have to be content with a cursory examination in order to include it within the compass of this work. The learned reader will find the whole subject ably treated in Wharton on Criminal Law, and also in Bishop's works on the same subject. Jeopardy attaches when an accused is put on trial on a valid indictment, and all the preliminary steps essential to the validity of the trial have been taken, the jeopardy attaches from the moment the trial is begun, and the trial is deemed to commence at the time the jury is impaneled, or, in the language of the Supreme Court of Kentucky, when "a jury has been charged with his deliverance, and a jury has been thus charged when they have been impaneled and sworn,"<sup>1</sup> the jeopardy of the accused has commenced so far as to be fully protected by the provision of the Constitution from the peril of a second trial for the same offense." And such is the case though there should be no verdict rendered in the trial, if the failure or default has accrued by means of any fault or neglect on the part of the State or its officials; as where the prosecuting attorney declares that he abandons the case or enters a *nolle prosequi*, or the progress of the trial is in any way put an end to; as where he conceives he has not sufficiently prepared the evidence to warrant a verdict; or fears that his indictment is so defective that it will not sustain the verdict in case the defendant moves in arrest of judgment, or the judge misconceives the law, or decides some question of law against him; in any such or the like instances, the proceeding, without the verdict, is a bar to any second prosecution.<sup>2</sup>

§ 420. A person once placed upon his trial before a competent court and jury, charged with his case upon a valid indictment, is in jeopardy, in the sense of the Constitution, unless

<sup>1</sup> *Maden v. Emmons*, 83 Ind. 331; *Kingen v. State*, 46 Ind. 132; *State v. Walker*, 26 Ind. 346; *Joy v. State*, 14 Ind. 139; *Brinkman v. State*, 57 Ind. 76; *Weaver v. State*, 83 Ind. 289; *O'Brien v. Commonwealth*, 9 Bush, 333; *Williams v. Commonwealth*, 78

Ky. 93; *Mount v. State*, 14 Ohio, 295; *Page v. State*, 3 Ohio St. 229; *Stewart v. State*, 15 Ohio St. 155; *Com. v. Cook*, 6 S. & R. 577; *Spier's Case*, 1 Dev. 491; *Williams Case*, 2 Gratt. 567; *Com. v. Clue*, 3 Rawle, 498.

<sup>2</sup> *Com. v. Harrison*, 2 Virg. Cas. 202; *State v. Buchanan*, 5 H. & J. 174.

such jury be discharged without rendering a verdict, from a legal necessity or from cause beyond the control of the court, such as death, sickness, or insanity of some one of the jury, the prisoner, or the court, or by consent of the prisoner; and if such a jury render a verdict or be discharged before a verdict, without such legal necessity, controlling cause, or consent, the prisoner is forever protected from a re-trial upon the same or any other indictment for the same offense, unless at his instance the verdict be set aside or judgment be reversed.<sup>1</sup>

The discretion of the court in the discharge of a jury for inability to agree must, however, be exercised upon some kind of evidence, and the judgment of the court on the point should be expressed in some form upon the record. A report made by the sheriff to the court, that the jury say they are unable to agree, is not evidence upon which the court can act in discharging the jury for inability to agree. The proper course is to call the jury into court, and have them announce their inability in the presence of the court. If, while a jury is out deliberating upon their verdict in a criminal case, and before the expiration of the term, the judge, without calling the jury into court, adjourns the court for the term, this is equivalent to an acquittal of the defendant. It is held that the discharge of a juror, against the objection of the prisoner, after the jury is sworn, operates as a discharge of the entire jury, but it does not operate as an acquittal or bar another trial.<sup>2</sup>

§ 421. One cannot be twice tried for the same crime.\* Thus

<sup>1</sup> *People v. Webb*, 58 Cal. 467; *O'Brian v. Commonwealth*, 9 Bush, 333; *State v. Wilson*, 50 Ind. 487; *Grant v. People*, 4 Park. C. R. 527; *Teut v. State*, 53 Miss. 439; *Maxwell, in re*, 11 Nev. 428; *People v. Cage*, 48 Cal. 324; *State v. Lennig*, 42 Ind. 541; *People v. Hunkeler*, 48 Cal. 331; *State v. Alman*, 64 N. C. 364; *King v. People*, 5 Hun, 297; *Nolan v. State*, 55 Ga. 521; *Clements, in re*, 50 Ala. 459; *People v. Barrett*, 2 Caines, 304; *Reynolds v. State*, 3 Ga. 53; *Baker v. State*, 12 Ohio S. 214; *State v. Krebs*, 8 Ala. 951; *Commonwealth v. Tuck*,

20 Pick. 256; *People v. Jones*, 49 Mich. 554.

<sup>2</sup> *Nixon v. State*, 55 Ala. 129; *Lester v. State*, 33 Ga. 329; *State v. Vaughn*, 29 Iowa, 28.

<sup>3</sup> *Buhler v. State*, 64 Ga. 504; *Hirshfield v. State*, 11 Tex. App. 207; *State v. Murray*, 55 Iowa, 530; *Commonwealth v. Robinson*, 126 Mass. 259; *Ferguson v. People*, 90 Ill. 510; *Wilcox v. State*, 6 Lea, 571; S. C., 40 Am. R. 53; *Commonwealth v. Bright*, 78 Ky. 238; *State v. Brown*, 49 Vt. 487; *Berry v. State*, 65 Ala. 117; *State v. De Graffenreid*, 9 Bax 287.

an acquittal for selling intoxicating liquor is a bar to a subsequent prosecution for the same offenses put in issue in the former case.<sup>1</sup>

Thus a conviction for simple larceny, or petit larceny, or a conviction for burglary with intent to commit larceny, will bar a subsequent prosecution on an indictment for the same larceny,<sup>2</sup> and is a bar to a subsequent indictment for the same larceny alleging ownership of the same property in another.<sup>3</sup> So a conviction for swindling is a good bar to a prosecution for "uttering a forged instrument,"<sup>4</sup> while the pendency of an indictment is not a good ground for a plea in abatement to another indictment in the same court for the same cause. Whenever either of them—and it matters not which—is tried and judgment pronounced thereon, such judgment will afford a good plea in bar to the other, either of *autrefois convict*, or *autrefois acquit*, but nothing short of an acquittal or conviction will support such a plea.<sup>5</sup> So one may be convicted of either of two felonies which have so merged that, if the proper plea were interposed, he could not be convicted of both.<sup>6</sup>

The Supreme Court of Massachusetts in a late case<sup>7</sup> said: "An offense is in its nature indivisible. It may consist of a series of acts, but that series constitutes but one offense. It may

<sup>1</sup> State v. Brown, 49 Vt. 487; Commonwealth v. Robinson, 126 Mass. 259.

<sup>2</sup> State v. De Graffenried, 9 Baxter, 287; State v. Wiles, 26 Minn. 381; State v. Gleason, 56 Iowa, 203; State v. Murray, 55 Iowa, 530, Williams v. Commonwealth, 78 Ky. 93.

<sup>3</sup> Goode v. State, 70 Ga. 752; Gordon v. State, 71 Ala. 315.

<sup>4</sup> Hirschfield v. State, 11 Tex. App. 207.

<sup>5</sup> Smith v. Commonwealth, Pa. St. ; Commonwealth v. Drew, 3 Cush. 279; Reg v. Goddard, 2 Ld. Raym. 920; Whart. C. P. & P. § 431.

<sup>6</sup> State v. Archer, 54 N. H. 465; State v. Snyder, 50 N. H. 150; State v. Emerson, 53 N. H. 619; State v.

Leavitt, 33 Me. 183; State v. Smith, 43 Vt. 324; Commonwealth v. Squire, 1 Mete. 238, Commonwealth v. McPike, 3 Cush. 181, Commonwealth v. Burke, 14 Gray, 100; Commonwealth v. Bakeman, 105 Mass. 53, Commonwealth v. Dean, 109 Mass. 349, State v. Shepard, 7 Conn. 54, State v. Parmelee, 9 Conn. 259; People v. Smith, 57 Barb. 46, Barnett v. People, 54 Ill. 325, Regina v. Neale, 1 C. & K. 591, S. C., 1 Den. Cr. C. 36; Regina v. Button 11 A. & E. (N. S.) 929, Bank Prosecutions, Russ. & Ry. 378, 3 Inst. 139; 2 Hawk. P. C., ch. 29, § 1; 1 Russ. Cr. 31; 1 Bish. Cr. L., § 608, Lewis Cr. L. 599; Bick. Cr. Pr. 15; State v. Buzzell, 59 N. H. 65.

<sup>7</sup> Commonwealth v. Robinson, 126 Mass. 259.

not only require a series of acts, but a duration of time to constitute the offense; but when the acts and the time are properly proved, the offense is single and indivisible. There is, therefore, no such thing known in law as a judgment of conviction or acquittal being a bar to part of an offense. It must be a bar to the whole, or it is of no value." The offense charged in this complaint is that of keeping a tenement for the illegal sale of intoxicating liquors between June 1, 1878, and August 20, 1878. If the defendant thus kept the tenement during every hour of the time between those dates, he has committed but one offense. It is true that such offense is continuous in its character. It is not an offense committed by a single sale of intoxicating liquors, but it is that of maintaining a common resort for the purchase of intoxicating liquors, which the Legislature has deemed it proper to declare to be a common nuisance. But it has been frequently held that, in order to constitute the offense there need to be no proof offered that the place was so kept on each day of the time during the interval alleged in the complaint; but it is sufficient if during any portion of such time it is so kept; and it would not be claimed by any one that a conviction could be had of the same offense, if the time were in the two complaints precisely the same; nor would it be claimed that a former conviction would not be a bar, if the dates in the new complaint were both within the terminal dates of the former complaint. It is however, contended that whenever the last complaint embraces a time which is not included in the previous complaint, evidence may be offered, and a conviction had for acts done within such time applying the principles laid down in<sup>1</sup> and in several other cases, to the case at bar, the same evidence, which would have warranted a conviction upon the first complaint would have warranted conviction upon the present complaint; for, upon the second complaint, the jury would have been required to convict the defendant, if it should appear that he committed the acts complained of at any time between January 1, 1878, and June 1, 1878. The plea of former acquittal, therefore, if established, should have been a bar to this complaint.<sup>2</sup> But where judgment

<sup>1</sup> Commonwealth v. Armstrong, 7 Gray, 49.

<sup>2</sup> Commonwealth v. Robinson, 126 Mass. 259.

is procured by the fraud of the defendant, as if where he virtually conducted the prosecution and filed the complaint, such judgment is no bar to another action for the same offense.<sup>1</sup>

§ 422. The question whether a former acquittal or conviction is a bar to a subsequent trial, is to be decided by determining whether the offense charged in the former action is the same as that in the subsequent one. If it is the same offense, it is a bar to the second action. If it is not the same, then it is neither a bar nor is it admissible in evidence under it. An offense is in itself indivisible. It may consist of a series of acts, but that series of acts constitutes but one offense. It may not only require a series of acts, but a duration of time, to constitute the offense; but when the acts and the time are properly proved, the defense is single and indivisible. There is, therefore, no such thing known in law as a judgment of acquittal or conviction being a bar to part of an offense. It must be a bar to the whole, or it is of no effect. The true test by which to decide whether a plea of *autrefois* acquit, or *autrefois* convict, is a sufficient bar in any particular case, is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. Would the same evidence be necessary to secure a conviction in the pending, as in the former, prosecution? If it would be, then the plea of former acquittal would be a complete bar to the pending prosecution, otherwise not.<sup>2</sup> An acquittal on an indictment

<sup>1</sup> State v. Little 1 N. H. 257; State v. Green, 16 Iowa, 239; State v. Brown, 16 Conn. 164; R v. Davis, 12 Mod. 9; State v. Atkins, 9 Humph. 677; Bulson v. People, 31 Ill. 409; State v. Cole, 48 Mo. 70; Warriner v. State, 3 Tex. App. 104.

<sup>2</sup> Brinkerman v. State, 57 Ind. 76; Commonwealth v. Miller, 5 Dana, 370; Commonwealth v. Cunningham, 13 Mass. 45; Commonwealth v. Bakeman, 105 Mass. 53; Commonwealth v. Robinson, 126 Mass. 259; Commonwealth v. Wade, 17 Pick. 395; Commonwealth v. Torney, 97 Mass. 50;

Commonwealth v. Kinney, 2 Va. Cas. 139; Commonwealth v. Robey, 12 Pick. 496; Canter v. People, 38 How. Pr. 91; Costar v. Hetherington, 1 E. & E. 802; Durham v. People, 5 Ill. 42; Gregg v. State, 55 Ala. 116; Gerard v. People, 4 Ill. 363; Guedel v. People, 43 Ill. 226; Hancock v. Somes, 1 E. & E. 795; Holt v. State, 38 Ga. 187; Hite v. State, 9 Yerg. 357; Parchman v. State, 2 Tex. App. 228; People v. Barnett, 1 Johns. 66; People v. Van Kentzen, 5 Park. 65; Price v. State, 19 Ohio, 423; R. v. Embden, 9 East, 437; R. v. Champneys, 2 Moo. 26;

for burglary and larceny may be pleaded to an indictment for the same goods, because in either of these cases the prisoner might on the former trial have been convicted of the offense charged against him in the second indictment.<sup>1</sup> When several articles belonging to the same person are stolen by the same person simultaneously, they may be included in one count, and a conviction or acquittal on such count, or on any divisible allegation thereof, bars a future indictment for the stealing of the articles enumerated in that count.<sup>2</sup> An acquittal, without the judgment of the court thereon is a bar.<sup>3</sup> So, if the indictment is insufficient, yet if the prisoner could have been *legally* convicted on the first indictment, upon any evidence that might have been legally adduced, he has been in jeopardy, but not if judgment has been arrested or reversed, or the indictment is quashed, so that there has been no trial. When a man has once been indicted for an offense, and acquitted, he can not afterwards be indicted for the same offense, provided the first indictment were such that he could have been lawfully convicted upon it by proof of facts contained in the second indictment; and if he be thus indicted a second time, he may plead *autrefois acquit*, and it will be a good bar to the indictment.<sup>4</sup> This plea is clearly founded on the prin-

Sanders v. State, 55 Ala. 42; State v. Cowan, 29 Mo. 330; State v. Tweedy, 11 Iowa, 350; State v. McNally, 32 Iowa, 580; State v. Reed, 12 Md. 263; State v. Kay, 1 Rice, 1; State v. Risher, 1 Rich. 219; State v. Revels, 1 Busb. 120; State v. Keogh, 13 La. Ann. 243; State v. Stanley, 4 Jones, L. 290; State v. Fife, 1 Bail. 1; State v. Standifer, 5 Port. 523; State v. Benham, 7 Conn. 414; State v. Eggesht, 41 Iowa, 374; State v. Davison, 78 N. C. 415; State v. Warner, 14 Ind. 572; State v. Elder, 65 Ind. 282; S. C., 32 Am. R. 69; State v. Hattabough, 66 Ind. 223; Trittipa v. State, 13 Ind. 360; U. S. v. Hamison, 3 Sawyer, 556; Winniger v. State, 13 Ind. 540; Wilson v. State, 24 Conn. 37; Morey v. Commonwealth, 108 Mass. 483; Smith v. State, 85 Ind. 553;

Simco v. State, 9 Tex. App. 338.

<sup>1</sup> Helsham v. Blackwood, 11 C. B. 111; Goode v. State, 70 Ga. 752; Gordon v. State, 71 Ala. 315.

<sup>2</sup> R. v. Carson, R. & R. 303; Furneaux, In re. R. & R. 335; Wilson v. State, 45 Tex. 76; R. v. Besthel, C. & M. 609; Commonwealth v. Sutherland, 109 Mass. 312; Commonwealth v. Williams, 2 Cosh 583; Commonwealth v. O'Connell, 12 Allen, 451; Commonwealth v. Eastman, 2 Gray, 76; Jackson v. State, 14 Ind. 327; People v. Wiley, 3 Hill, 194; State v. Cameron, 40 Vt. 555; State v. Williams, 10 Hump. 101; State v. Thurston, 2 McMull. 382; Torton v. State 7 Mo. 55; Stuart v. Commonwealth 28 Gratt. 950.

<sup>3</sup> West v. State, 22 N. J. L. 212.

<sup>4</sup> R. v. Bird. 2 Den. C. C. 94; R. v.

ciple, that no man shall be placed in peril of legal penalties more than once upon the same accusation—*nemo debet bis puniri pro uno delicto*.<sup>1</sup> An acquittal or conviction for a greater offense bars a subsequent indictment for the lesser offense included in the former, if the defendant could have been convicted upon the same evidence of the lesser offense. The rule seems to be that a former trial is not a bar unless the first indictment was such that the prisoner might have been convicted upon proof of the facts set forth in the second indictment.<sup>2</sup>

§ 423. The question of former acquittal cannot be raised by motion; it must be specially pleaded.<sup>3</sup> It being new affirmative matter, and not a denial of any allegation of the indictment, the burden of proof, on a traverse of the plea, is on the defendant,<sup>4</sup> and he has the opening and close. But if the State replies fraud<sup>5</sup> or other new affirmative matter, the burden of proof on the latter issue is on the State. In some jurisdictions when, after an acquittal on part of an indictment, there is a new trial of the rest, a special plea in bar of the further maintenance of so much of the charge as has been disposed of is not required.<sup>6</sup> But as such a defense may raise questions that cannot be appropriately presented under the general issue, and are likely to lead to confusions and mistrials on that issue, it is the safer and better practice, in all cases, to admit the defense of former acquittal (whether total or partial) only upon a special plea leading to a

Vandercomb, 2 East P. C. 519; R. v. Birchenough, 1 Moo. C. C. 479; R. v. Button, 11 Q. B. 929; State v. Moon, 41 Wis. 684; Day v. Commonwealth, 23 Gratt. 915; State v. Lee, 10 R. I. 494; Maher v. State, 53 Ga. 448; State v. Brown, 49 Vt. 437.

<sup>1</sup> Baker, in re, 2 H. & N. 248.

<sup>2</sup> Burns v. People, 1 Park. 182; Price v. State, 19 Ohio, 423; Cone v. Wade, 17 Pick. 395; Cone v. Roby, 12 Id. 496; State v. Birmingham, Busbee's L. (N. C.) 120; Roberts v. State, 18 Ga. 8; Whart. §§ 563, 565, 566; Thomas v. State, 40 Tex. 36; Vestal v. State, 3 Tex. Ct. App. 648.

<sup>3</sup> Zachary v. State, 7 Baxt. 1; Rickles v. State, 68 Ala. 538; State v. Buzzell, 59 N. H. 65; State v. Sias, 17 N. H. 558; U. S. v. Wilson, 7 Pet. 150; Com. v. Gould, 12 Gray, 171; Com. v. Merrill, 8 Allen, 545; Com. v. Bakeman, 105 Mass. 53; Rex v. Bowman, 6 C. & P. 337; 1 Whart. Cr. L. § 568.

<sup>4</sup> Com. v. Daley, 4 Gray, 209; State v. Small, 31 Mo. 197; Rex v. Parry, 7 C. & P. 836; Rex v. Sheen, 2 C. & P. 634.

<sup>5</sup> State v. Little, 1 N. H. 257.

<sup>6</sup> State v. Martin, 30 Wis. 216; S. C., 11 Am. Rep. 567.

distinct issue of law or fact in the record. The court will assign the defendant counsel to put his plea of former acquittal or former conviction in due form, because it is a special plea.<sup>1</sup>

§ 424. In a plea of *autrefois convict* or *acquit* the former indictment must be set out in full, and the conviction or acquittal under it, with averments of the identity of the prisoner and the offense.<sup>2</sup> Where there has been neither a conviction or acquittal, it must state that the defendant was put upon his trial on a good indictment, and also that the jury were duly impanelled and sworn, and charged with his trial, and were, without his consent, and without any pressing necessity discharged without rendering a verdict.<sup>3</sup>

It is indispensable to the plea of former conviction that the court whose record is relied upon to sustain it had jurisdiction over the alleged offense.<sup>4</sup> A conviction or acquittal by a court having no jurisdiction of the cause, being *coram non judice*, does not place the defendant in jeopardy and is no bar to a trial for the offense by a tribunal having the requisite jurisdiction.<sup>5</sup>

A plea of *autrefois convict* should set forth the former record, including the indictment, so that it may be made to appear that the former conviction was for the same offense for which the defendant is now on trial. A mere general allegation that a former conviction has taken place is not sufficient, and such a plea will be stricken from the record.<sup>6</sup> A plea of former acquittal is sufficient, if it shows that the defendant had been

<sup>1</sup> 2 Hale's P. C. 241; *Rex v. Chamberlain*, 6 C. & P. 93.

<sup>2</sup> *Henry v. State*, 33 Ala. 389; *State v. Wister*, 62 Mo. 592; *Quitson v. State*, 1 Tex. App. 47; *Brill v. State*, 1 Tex. App. 152; *Crocker v. State*, 47 Ga. 568; *State v. Parish*, 43 Wis. 395; *People v. Sanders*, 4 Park. C. R. 196; *Bailey v. State*, 26 Ga. 579; *Rocco v. State*, 37 Miss. 357.

<sup>3</sup> *Lyman v. State*, 47 Ala. 686; *Canter v. People*, 1 Abb. N. Y. App. 305.

<sup>4</sup> *Thompson v. State*, 6 Neb. 102; *Norton v. State*, 14 Tex. 387; *State v.*

*Hodgins*, 43 N. H. 475; *Commonwealth v. Peters*, 12 Met. 387; *State v. Brown*, 16 Conn. 54; *Stevens v. Fassett*, 27 Me. 666; *State v. Odell*, 4 Blackf. 156; *Hodges v. State*, 5 Cold. 7; *Canter v. People*, 38 How. P. 91.

<sup>5</sup> *Commonwealth v. Alderman*, 4 Mass. 477; *Commonwealth v. Peters*, 12 Met. 387; *Rector v. State*, 6 Ark. 187; *State v. Payne*, 4 Mo. 376; *State v. Odell*, 4 Blackf. 156; *Marston v. Jenness*, 11 N. H. 156; *Levy v. State*, 6 Ind. 281; *Dunn v. State*, 2 Ark. 229; *R. v. Bowman*, 6 C. & P. 337.

<sup>6</sup> *Wilson v. State*, 68 Ga. 827; *Crocker v. State*, 47 Ga. 568.

indicted, tried and acquitted, in a court of competent jurisdiction, for the same felony charged in the indictment in the pending case; for the fundamental law forbids, that a person charged with crime be put in jeopardy twice for the same offense,<sup>1</sup> or if it shows a jury impaneled and a prosecution of the case until the State rested as this entitles the defendant to a verdict one way or another.<sup>2</sup> Parol evidence is admissible to identify the offense under a former conviction<sup>3</sup> in aid of the record. It is said that this plea cannot be raised by *habeas corpus*.<sup>4</sup> This may, however, be questioned.

§ 425. There can be no doubt but that the principle, *Nemo bis punitur pro eodem delicto*, applies not only to a second trial but to a second or subsequent sentence or punishment pronounced by the same court. There is no difference in principle between two trials and two sentences for the same offense. The constitutional provision which prohibits one prohibits the other. It is a well-settled principle that the Supreme Court of the United States has no power under any act of Congress to review a judgment in a criminal case rendered by the inferior courts, for the reason, in the language of Chief Justice Marshall, "that a judgment in its nature concludes the subject on which it is rendered and pronounces the law of the case, if the judgment of a court of record whose jurisdiction is final is as conclusive on all the world as the judgment of this court would be. It puts an end to inquiry concerning the fact by deciding it."<sup>5</sup> Yet a party unlawfully sentenced is not without a remedy. Thus, where a prisoner shows that he is held under a judgment of a federal court, made without authority of law, the Supreme Court will,

<sup>1</sup> *Burk v. State*, 81 Ind. 123.

<sup>2</sup> *People v. Jones*, 48 Mich. 554.

<sup>3</sup> *Dunn v. State*, 70 Ind. 47; *Wilkinson v. State*, 59 Ind. 416; *State v. Andrews*, 27 Mo. 267; *Commonwealth v. Dillane*, 11 Gray, 67; *R. v. Bird*, 5 Cox C. C. 20; *Duncan v. Commonwealth*, 6 Dana, 295. But see *Jacobs v. State*, 6 Lea, 196, where it is held it must be proven by the record.

<sup>4</sup> *Pitner v. State*, 44 Tex. 578.

<sup>5</sup> *Watkins. in re*, 3 Pet. 202; *Rex v.*

*Stratton*, 21 How. St. Tr. 1187; *U. S. v. Gibert*, 2 Sumn. 22; *People v. Holbrook*, 13 Johns. 90; *Barker, in re*, 7 Cowen, 143; *People v. Vermilyea*, 7 Cow. 108; *U. S. v. More*, 3 Cranch, 170; *Durousseau v. U. S.*, 6 Cranch, 314; *Kearney, in re*, 7 Wheat. 42; *Forsyth v. U. S.*, 9 How. 571; *Kaine, in re*, 14 How. 120; *Watkins, in re*, 7 Pet. 568; *Gordon, in re*, 1 Black. 505; *Johnson v. U. S.*, 3 McL. 89; *Reed, in re*, 100 U. S. 13.

by writs of *habeas corpus* and *certiorari*, look into the record, so far as to ascertain that fact, and if it is found to be so, will discharge the prisoner.<sup>1</sup> Courts of justice may refuse to grant the writ of *habeas corpus* where no probable ground for relief is shown in the petition, or where it appears that the petitioner is duly committed for felony or treason plainly expressed in the warrant of commitment; but where probable ground is shown that the party is in custody under or by color of authority of the United States or a State, and is imprisoned without just cause, and, therefore, has a right to be delivered, the writ of *habeas corpus* then becomes a writ of right which may not be denied, as it ought to be granted to every man who is unlawfully committed or detained in prison or otherwise restrained of his liberty.

§ 426. As an illustration of two important elements in the doctrine of estoppel—the conclusive effect of a judgment, the distinction between a void and voidable judgment, and the doctrine that no man shall be punished twice for the same offense, the following case may be referred to: Thus, where the statute provided a punishment in the alternative, either fine or imprisonment, and the court fined the prisoner and sentenced him to one year's imprisonment, the prisoner paid his fine and was serving his sentence when he was brought before the same court during the same term on *habeas corpus*, and again sentenced for a year from that time. The prisoner commenced proceedings on *habeas corpus* in the Supreme Court of the United States. That court, by Judge Miller, said: The general principle applicable to both civil and criminal cases, that the judgments, orders and decrees of the courts of this country are under their control during the term at which they are made; so that they may be set aside or modified as law and justice may require. But this power cannot be so used as to violate the guarantees of personal rights found in the common law and in the constitutions of the States and of the Union.

<sup>1</sup> Hamilton, in re, 3 Dall. 17; Buford, in re, 3 Cranch, 448; Bollman, in re, 4 Cranch, 75; Watkins, in re, 3 Pet. 202; Metzger, in re, 5 How. 176; Kaïne, in re, 14 How. 103; Wells, in

re, 18 How. 307; Lange, in re, 18 Wall. 163; Milligan, in re, 4 Wall. 2; McCardle, in re, 6 Wall. 318; Watkins, in re, 7 Pet. 568; Yerger, in re, 8 Wall. 85; McCardle, in re, 7 Wall. 506

The judgment of the courts in this class of cases extends to life, liberty and property. The terms of many of them extend through considerable periods of time, often many months, with adjournments and vacations in the same term, at the discretion of the judge. A criminal may be sentenced to a disgraceful punishment, as whipping, or, as in the old English law, to have his ears cut off, or to be branded in the hand or forehead.

The judgment of the court to this effect being rendered and carried into execution before the expiration of the term, can the judge vacate that sentence and substitute fine or imprisonment, and cause the latter sentence also to be executed? Or if the judgment of the court is that the convict be imprisoned for four months, and he enters immediately upon the period of punishment, can the court, after it has been fully completed, because it is still in session of the same term, vacate that judgment and render another, for three or six months' imprisonment, or for a fine? Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal is manifest.

§ 427. Applying the maxim, *nemo bis punitur pro eodem delicto*, and explaining its application to the case, the learned judge said: "If we reflect that at the time this maxim came into existence almost every offense was punished with death or other punishment touching the person, and that these pleas are now held valid in felonies, minor crimes and misdemeanors alike, and on the difficulty of deciding when a statute under modern systems does or does not describe a felony when it defines and punishes an offense, we shall see ample reason for holding that the principle intended to be asserted by the constitutional provision must be applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence.

"For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly, it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would

legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?

"The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.

"But there is a class of cases in which a second trial is had without violating this principle. As, when the jury fail to agree and no verdict has been rendered,<sup>1</sup> or the verdict set aside on motion of the accused, or on writ of error prosecuted by him,<sup>2</sup> or the indictment was found to describe no offense known to the law.

"The petitioner, then, having paid into court the fine imposed upon him of two hundred dollars, and that money having passed into the Treasury of the United States, and beyond the legal control of the court, or of any one else but the Congress of the United States, and he having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate that judgment entirely, and, without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so, is to punish him *twice* for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing.

"The force of this proposition cannot be better illustrated than by what occurs in the present case if the second judgment is carried into effect. The law authorizes imprisonment not exceeding one year *or* a fine not exceeding two hundred dollars. The court, through inadvertence, imposed both punishments, when it could rightfully impose but one. After the fine was

<sup>1</sup> United States v. Perez, 9 Wheat.  
579.

<sup>2</sup> People v. Casborus, 18 Johnson,  
351.

paid and passed into the treasury, and the petitioner had suffered five days of his one year's imprisonment, the court changed its judgment by sentencing him to one year's imprisonment from that time. If this latter sentence is enforced, it follows that the prisoner in the end pays his two hundred dollars fine and is imprisoned one year and five days, being all that the first judgment imposed on him, and five days' imprisonment in addition. And this is done because the first judgment was confessedly in excess of the authority of the court.

"But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous, but not void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void.

"But we do not concede the major premise in this argument. A judgment may be erroneous and not void, and it may be erroneous *because* it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other, as they are regarded for different purposes.

"When the prisoner, as in this case, by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. That the principle we have discussed then interposed its shield, and forbid that he should be punished again for that offense. The record of the court's proceedings, at the moment the second sentence was rendered, showed that in that very case, and for that very offense, the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense, and had suffered five days' imprisonment on account of the other. It thus showed the court that its power to punish for that offense was at an end. Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did not exist.

"It is no answer to this to say that the court had jurisdic

tion of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or, if on an indictment for treason, the court should render a judgment of attain, whereby the heirs of the criminal could not inherit his property, which should, by the judgment of the court, be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court, and forbidden by the Constitution.

A case directly in point is that of *Bigelow v. Forrest*.<sup>1</sup> The doctrine of that case is reaffirmed at the present term,<sup>2</sup> where it is said that in *Bigelow v. Forrest* "we also determined that nothing more was within the jurisdiction or judicial power of the District Court (than the life estate), and that consequently a decree condemning the fee could have no greater effect than to subject the life estate to sale.

"But why could it not? Not because it wanted jurisdiction of the property or of the offense, or to render a judgment of confiscation, but because in the very act of rendering a judgment of confiscation it condemned more than it had authority to condemn. In other words, in a case where it had full jurisdiction to render one kind of judgment, operative upon the same property, it rendered one which included that which it had a right to render, and something more, and this excess was held simply void. The case before us is stronger than that, for unless our reasoning has been entirely at fault, the court in the present case could render no second judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the Constitution, and by

<sup>1</sup> 9 Wallace, 339.

<sup>2</sup> *Day v. Micou*, 18 Wall. 156.

the dearest principles of personal rights, which both of them are supposed to maintain.

“There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States, or the well-settled principles of the common law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, and he should therefore be discharged.”

§ 428. A judgment for false imprisonment is a bar to an action of slander for the same accusation on which the imprisonment was procured.<sup>1</sup> In an action for malicious prosecution, the plaintiff is entitled to recover damages not only for his unlawful arrest and imprisonment, and for the expense of his defense, but for the injury to his fame and character by reason of the false accusation. The latter indeed is, in many cases, the gravamen of the action. An accusation of crime, made under the forms of law, or on the pretense of bringing a guilty man to justice, is made in the most imposing and impressive manner, and may inflict a deeper injury upon the reputation of the party accused, than the same words uttered under any other circumstances. The most appropriate remedy for the calumny in such cases, is by the action for malicious prosecution. The injured party cannot be entitled to two recoveries for the same cause, and a recovery in that form must, therefore, be a bar to a subsequent action of slander, for the same identical accusation.<sup>2</sup> So in a suit on a distiller's bond the answer set up a compromise made by the proper officer, sanctioned by the Secretary of the Treasury and the Attorney General and the dismissal and abandonment of the indictment was held a good plea in bar to a civil suit on the bond.<sup>3</sup>

<sup>1</sup> Sheldon v. Carpenter, 4 N. Y. 579.

<sup>2</sup> Campbell v. Butts, 3 N. Y. 174;

Howard v. Sexton, 4 N. Y. 157; Rock-

well v. Brown, 36 N. Y. 207; Leonard v. Pope, 27 Mich. 145.

<sup>3</sup> U. S. v. Choteau, 103 U. S. 603.

§ 429. The decisions in inferior courts of justice, convictions by magistrates, and in fact, all other legal and authorized adjudications—as, for instance, sentences of expulsion from colleges, or court-martials, or deprivations by visitors and all other quasi tribunals—are evidence to establish the fact that such an adjudication has taken place, and all the legal consequences that may be derived from it. One of these legal consequences is the protection of any party who has acted in a judicial capacity within the limits of his judicial authority.

A judge of a superior court or court of general jurisdiction is not liable for a judicial act in a matter within his jurisdiction, although the act is in excess thereof.<sup>1</sup> For when the act of a judge is a judicial one, done *pendente lite*, no action lies, however wrong and injurious to the party, whether the act was done *mala fide*, or with the most honest intention, provided the justice had jurisdiction of the parties and of the subject matter of the suit. But if he has not jurisdiction of the subject matter, or of the party, his judicial acts in the case are *coram non iudice* and void, and he and all the parties concerned in executing his judgment are trespassers.<sup>2</sup> But if a ministerial duty is annexed to a judicial office, if the officer execute that ministerial

<sup>1</sup> Groenwelt v. Bunnell, 1 Ld. Raym. 454; Randall v. Bringham, 7 Wall. 523; Ackery v. Parkinson, 3 M. & S. 411; Lange v. Benedict, 73 N. Y. 72; Bushell's Case, 1 Mod. 118; Scott v. Stansfield, 3 L. R. Exchq. 230; Floyd v. Baker, 12 Co. 23; Aire v. Sedgwick, 2 Roll. 199; Gwynne v. Poole, Lutw. 290; Hammond v. Howell, 1 Mod. 184; Taffe v. Downes, 3 Moo. P. C. 41; Fray v. Blackburn, 3 B. & S. 576; Pratt v. Gardner, 2 Cush. 68; Yates v. Lansing, 5 Johns. 282; Bradley v. Fisher, 13 Wall. 335; Baihyte v. Shepherd, 35 N. Y. 251; Floyd v. Baker, 12 Co. 26; Miller v. Seare, 2 Bl. R. 1141; Yates v. Lansing, 9 Johns. 424; Phelps v. Sill, 1 Conn. 315; Living v. Bentham, 2 Bay S. C. 1; Downing v. Herrick, 47 Me. 462; Dodswell v. Impey, 1 B. & C. 163;

Ela v. Smith, 5 Gray, 135; Burnham v. Steven, 33 N. H. 247; Moor v. Ames, 3 Caines, 170; Butler v. Potter, 17 Johns 145; Lowther v. Randor, 8 East, 113; Macon v. Cook, 2 N. & M. 379; Shoemaker v. Nesbit, 2 Hawle, 201.

<sup>2</sup> Taylor v. Doremus, 1 Harr. 473; Stone v. Graves, 8 Mo. 148; Lenox v. Grant, 8 Mo. 251; Upshaw v. Oliver, Dud. (Ga.) 241; Morrison v. McDonald, 22 Me. 550; Blood v. Sayre, 17 Vt. 609; Houlden v. Smith, 14 A. & E. (N. S.) 841; Pease v. Chaytor, 1 B. & S. 658; Revill v. Pettitt, 3 Met. (Ky.) 314; Knowles v. Davis, 2 Allen, 61; Piper v. Pearson, 2 Gray, 120; Wise v. Withers, 3 Cranch, 331; Inos v. Winspear, 18 Cal. 397; Tobin v. Anderson, 2 Strobb. 3; Smith v. Shaw, 12 Johns 257.

duty wrongfully, whether by mistake or fraud, he is answerable to the party injured in a suit at law. For fraud or corruption a judge can only be questioned by impeachment.<sup>1</sup>

§ 430. The principle which prevents a judge from being subjected to responsibility for his decision in a civil action, however injurious in its consequences it may have proved to the party, or however erroneous the act may have been, is one of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence, without which no judiciary can be either respectable or useful; it would establish the weakness of judicial authority in a degrading responsibility; it would tend to scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations. If a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected, for his protection, to the necessity of preserving a complete record of all the evidence before him in every litigated case, and of the authorities cited and arguments presented, in order that he might show to the judge before whom he might be summoned by the losing party—and that judge, perhaps, one of an inferior jurisdiction,—that he had decided as he did with judicial integrity, and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.<sup>2</sup> This principle of law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences. In order to insure parties this protection, the law declares that where actions are brought against magistrates and others, in consequence of what has been done under a conviction

<sup>1</sup> Taylor v. Doremus, 1 Harr. 473.

<sup>2</sup> Judge Field in Bradley v. Fisher  
13 Wall. 347, 349.

for any offense within their jurisdiction, the proceedings themselves, if regular, are evidence, not only of the fact of the conviction, but of the fact on which the judgment was founded; and the plaintiff is not at liberty to controvert and disprove it by evidence. For while a magistrate may form an erroneous opinion upon the facts, that is a matter that is properly a subject of appeal, and therefore where an appeal lies no action can be maintained until the merits have been heard and the conviction quashed.<sup>1</sup>

§ 431. Upon the same principle it has been held that upon an indictment for assault, in turning the prosecutor out of a college, the sentence of expulsion is conclusive evidence of the fact of the expulsion.<sup>2</sup> One who is appointed a visitor may examine into and regulate the conduct of members who partake of the charity, correct abuses and remove officers, and in a case of a college, expel or admit a fellow, and generally superintend the management of the trust. No court of law or equity can anticipate the judgment of a visitor, or take away his jurisdiction of the case in which he is called upon to interfere, if it appear to be within the scope of the general visitorial power. His determinations are final and conclusive, since it is in the nature of a judgment *in rem*, and he pronounces operatively upon the status of the party. A sentence of deprivation passed upon an old rector, was held conclusive in ejectment on the new rector.<sup>3</sup> In Massachusetts there is a statute giving an appeal to the Supreme Court from the decision of visitors appointed by the founders of charitable institutions removing a professor, but they have only the power of inquiring whether the visitors have exceeded their jurisdiction; if they have not, their decision is as final and conclusive as a judgment *in rem*. Courts look upon the determination of visitors or trustees as the criterion of the rights of parties, and a mandamus to restore the fellow of a college has been frequently refused. Still, they are, like judgments, impeachable for excess of jurisdiction, but not for informality or irregularity. Sentence of deprivation by a visitor differs from other determi-

<sup>1</sup> Fuller v. Fotch, Holt, 287; Bavlis v. Strickland, 1 M. & G. 591; Jones v. Brown, 54 Iowa, 74; S. C., 37 Am. R. 185.

<sup>2</sup> R. v. Gundon, Cowp. 815; Reg. v. Govs. Darlington School, 6 Q. B. 682.

<sup>3</sup> Phillips v. Bury, Skinn. 417; Kemp v. Neville, 13 C. B. N. S. 523.

nations in this respect, viz.: that it is the sentence of a tribunal which has, in many cases, been created by a private individual. This does not alter the principle; for though no private individual can create a court whose sentence shall have operation on the persons or properties of others, yet there is no reason why he should not create one having operation on his own, unless he introduced some term inconsistent with public policy. On the same ground on which a visitor's sentence is conclusive, stands the case of the trustees of a school, dismissing a school teacher for misconduct.<sup>1</sup>

§ 432. There are also other courts not of record that may be termed *quasi* of record, and among these are the military and naval courts or courts-martial. Courts-martial are lawful tribunals, existing by the same authority as civil courts of the United States. They have the same plenary jurisdiction in offenses by law military, as the latter courts have in controversies within their cognizance, and in their special and more limited sphere are entitled to as untrammelled an exercise of their powers. Every one connected with the military or naval service of the United States is amenable to the jurisdiction which Congress has created for their government, and while thus serving surrenders his right to be tried by the civil courts.<sup>2</sup> Provided a court-martial has jurisdiction to hear and determine, and to render the particular judgment or sentence imposed, however erroneous the proceedings may be, they cannot be reviewed collaterally.<sup>3</sup> The sentence of a court-martial is conclusive in any action in the courts of common law, when acting within their jurisdiction. These courts being established by positive law, their proceedings must depend upon the same rules as all other courts which are instituted and have particular powers given them. But where a party relying on the sentence of a court-martial as an estoppel

<sup>1</sup> Doe v. Haddon, 3 Doug. 310; Rex v. Darlington, 6 Q. B. 682.

<sup>2</sup> Davidson, in re, 21 Fed. Rep. 618; Milligan, in re, 4 Wall. 123.

<sup>3</sup> Dynes v. Hoover, 20 How. 65; Wooley v. U. S., 20 L. R. 61; Rex v. Scuddis, 1 East, 306; Grant v. Gould, 2 H. B. 100; State v. Wakely, 2 N.

& M. 410; Brown v. Wadsworth, 15 Vt. 170; Heffernan v. Porter, 6 Cold, 391; Poe, in re, 5 B. & A. 681; Davidson, in re, 21 Fed. R. 618; Kearney, in re, 7 Wheat. 38; Watkins, in re, 3 Pet. 193; Reed, in re, 100 U. S. 13; Keyes v. U. S., 109 U. S. 336.

neglects to have it placed on record, he can neither plead it as such, nor have the benefit of it.<sup>1</sup> No judgment can be conclusive unless the court had jurisdiction of the parties, and the jurisdiction of courts-martial embraces, first the soldiers by, and next the belligerents against whom the war is carried on.<sup>2</sup> The soldier subjects himself to military authority by enlisting or being mustered in. The belligerent who has been guilty of an offense against the laws of war or of nations may be tried and convicted as a spy or assassin, because there is no other tribunal before which he can be brought, and the vanquished are at the disposal of the victor. The first class may, moreover, sometimes and on the ground of necessity, include the whole population of a district menaced or invaded by a hostile force too powerful to be resisted without calling every one to arms, and subjecting all to that discipline of the court which is known as martial law. Beyond this the jurisdiction of such courts cannot extend consistently with the constitution of the United States or the common law, and as they are limited and inferior tribunals they act in all cases at their peril, and must plead and prove their authority when called to account subsequently for what they have done before the civil courts and in the ordinary courts of law.<sup>3</sup> *Prima facie* the citizen is entitled to a jury, and not liable to trial and conviction by a military tribunal, and the burden lies on those who allege the contrary to charge him, or for their own vindication. The suspension of the writ of *habeas corpus* does not vary this rule or enlarge the boundaries of martial law. It may temporarily preclude the right to demand a trial and a release from the civil tribunals, but it cannot give legal force or validity to the sentence of a court-martial.

§ 433. Thus, in a late case, in the U. S. Supreme Court, A. was a paymaster's clerk in the U. S. Navy. He was tried by a naval court martial for malfeasance in office, found guilty, and duly sentenced. The admiral declined to approve the judgment, and sent the proceedings back to the court, that the sentence

<sup>1</sup> Hannaford v. Hunn, 2 C. & P. 148.

<sup>2</sup> Tyler v. Pomeroy, 8 Allen, 480; Walton v. Gavin, 16 Q. B. 48.

<sup>3</sup> Wise v. Withers, 3 Cranch, 337; Wilson v. McKenzie, 7 Hill, 95; Wai-

den v. Bailey, 7 Taunton, 67; S. C., 4 M. & S. 400; Duffield v. Smith, 3 S. & R. 590; Mills v. Martin, 19 Johns. 7; Brooks v. Adams, 11 Pick. 442.

might be reviewed. The court thereupon imposed another severer sentence—two years' imprisonment, with loss of pay except \$10 monthly—\$500 and dishonourable discharge. A. brings his case here upon a writ of *habeas corpus*, alleging: first, that the naval court-martial could have no jurisdiction over a paymaster's clerk; second, that the first sentence exhausted the power of the court, and that the second was therefore a nullity; and, third, that the court could revise its former decision only on the ground of mistake, and that there was no mistake, and consequently no power of revision. This court holds that none of the prisoner's points are well taken; that the naval court-martial had jurisdiction over the person and the case; that the exercise of its discretion within authorized limits cannot be assigned for error and made the subject of review, even by an appellate court; and finally, that a writ of *habeas corpus* cannot be made to perform the functions of a writ of error.<sup>1</sup> The same court also held that "by the act of Congress of February 5, 1867, the several courts of the United States and its judges in their respective jurisdictions have, in addition to the authority previously conferred, power to grant writs of *habeas corpus* in all cases upon petition of any person restrained of his liberty in violation of the Constitution or of any law of the United States; and if it appear, on the hearing had upon the return of the writ, that the petitioner is thus restrained, he must be forthwith discharged and set at liberty." In a later case in that court it was said: "That the court-martial, as a general court-martial, had cognizance of the charges made, and had jurisdiction of the person of the appellant, is not disputed. This being so, whatever irregularities or errors are alleged to have occurred in the proceedings, the sentence of dismissal must be held valid when it is questioned in this collateral way."<sup>2</sup> This doctrine has been applied by this court to the judgment and sentence of a naval general court-martial, which was sought to be reviewed on a writ of *habeas corpus*.<sup>3</sup> Where there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the

<sup>1</sup> Reed, in re, 100 U. S. 13.

<sup>2</sup> Yerger, in re, 8 Wall. 101; Coleman v. Tennessee, 97 U. S. 509.

<sup>3</sup> Thompson v. Tolmie, 2 Pet. 157;

Voorhees v. Bank, 10 Pet. 449; Corbett v. Williams, 20 Wall. 266.

<sup>4</sup> Reed, in re, 100 U. S. 13.

court are not observed, there is no tribunal authorized by law to render the judgment.”<sup>1</sup>

In a leading case, the Supreme Court of the United States, by Mr. Justice Field, say, in construing the following section of an act of Congress: “That in time of war, insurrection or rebellion, murder, assault and battery with intent to kill, manslaughter, mayhem, wounding by shooting or stabbing, with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishment for such offenses shall never be less than those inflicted by the laws of the State, territory or district in which they may have been committed.”<sup>2</sup>

“In denying to the military tribunals exclusive jurisdiction over the offenses mentioned, when committed by persons in the military service of the United States, and subject to the articles of war under the section in question, we have reference to them when they were held in States occupying, as members of the Union, their normal and constitutional relations to the Federal government, in which the supremacy of that government was recognized, and the civil courts were open and in the undisturbed exercise of their jurisdiction. When the armies of the United States were in the territory of insurgent States, banded together in hostility to the national government, and making war against it; in other words, when the armies of the United States were in the enemy’s country, the military tribunals mentioned had, under the laws of war, and the authority conferred by the section named, exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to laws of the enemy, or amenable to his tribunals for offenses committed by them. They were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished.

“It is well settled that a foreign army, permitted to march through a friendly country, or to be stationed in it by permission

<sup>1</sup> *Keyes v. U. S.*, 109 U. S. 836.

<sup>2</sup> 12 U. S. Stats. p. 736

of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place." The sovereign is understood, said this court, in the celebrated case of *The Exchange*,<sup>1</sup> to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions: "In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it, would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require.

The same exemption from civil and criminal jurisdiction of the place is extended to an armed vessel of war entering the ports of a friendly country by permission of its government, or seeking an asylum therein in distress. She is accorded the rights of ex-territoriality, and is treated as if constituting a part of the territory of her sovereign. "She constitutes," said the court in the same case, "a part of the military force of her nation, acts under the immediate and direct command of the sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the right of hospitality."<sup>2</sup>

<sup>1</sup> 7 Cranch, 139.

<sup>2</sup> 7 Cranch, 144. See also Cushing on Belligerent Asylum, in *Opinions of*

*Attys.-Gen.*, vol. 7, p. 122; Halleck on *Int. Law*, chap. 7, § 25.

If an army marching through a friendly country would thus be exempt from its civil and criminal jurisdiction, *a fortiori*, would an army invading an enemy's country be exempt. The very fact that war is waged between two countries negatives the possibility of jurisdiction being exercised by the tribunals of the one country over persons engaged in the military service of the other for offenses committed while in such service. Aside from this want of jurisdiction, there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he had invaded.

The fact that when the offense was committed for which the defendant was indicted the State of Tennessee was in the military occupation of the United States, with a military governor at its head, appointed by the President, cannot alter this conclusion. Tennessee was one of the insurgent States forming the organization known as the Confederate States, against which the war was waged. Her territory was enemy's country, and its character in this respect was not changed until long afterwards.

The doctrine of international law on the effect of military occupation of enemy's territory upon its previous laws is well established. Though the late war was not between independent nations, but between different portions of the same nation, yet having taken the proportions of a territorial war, the insurgents having become formidable enough to be recognized as belligerents, the same doctrine must be held to apply. The right to govern the territory of the enemy during its military occupation is one of the incidents of war, being a consequence of its acquisition, and the character and form of the government to be established depend entirely upon the laws of the conquering State or the orders of its military commander. By such occupation the political relations between the people of the hostile country and their former government or sovereign are for the time severed; but the municipal laws, that is, those laws which regulate private rights, enforce contracts, punish crime, and regulate the transfer of property, remain in full force, so far as they affect the inhabitants of the country among themselves, unless suspended or superseded by the conqueror. And the tribunals by which the laws are enforced continue as before unless thus changed. In other words, the municipal laws of the State and their adminis-

tration remain in full force so far as the inhabitants of the country are concerned, unless changed by the occupying belligerent.<sup>1</sup>

This doctrine does not affect in any respect the exclusive character of the jurisdiction of the military tribunals over the officers and soldiers of the army of the United States in Tennessee during the war; for, as already said, they were not subject to the laws nor amenable to the tribunals of the hostile country. The laws of the State for the punishment of crime were continued in force only for the protection and benefit of its own people. As respects them, the same acts which constituted offences before the military occupation constituted offences afterwards; and the same tribunals, unless superseded by order of the military commanders, continued to exercise their ordinary jurisdiction.

"The laws of Tennessee with regard to offenses and their punishment, which were allowed to remain in force during its military occupation, did not apply to the defendant, as he was at the time a soldier in the army of the United States and subject to the articles of war. He was responsible for his conduct to the laws of his own government only as enforced by the commander of its army in that State, without whose consent he could not even go beyond its lines. Had he been caught, after committing the offense, by the forces of the enemy, he might have been subjected to a summary trial and punishment by order of their commander, and there would have been no just ground of complaint, for the marauder and assassin are not protected by any usages of civilized warfare. But the courts of the State, whose regular government was superseded, and whose laws were tolerated from motives of convenience, were without jurisdiction to deal with him."<sup>2</sup> It is held that an acquittal before a court martial cannot be pleaded in defense of an indictment in a court of law, even though the offense charged in either case be substantially the same.<sup>3</sup>

§ 434. Judgments of courts for the trial of civil causes established during a war by the military authorities in possession of the country of an enemy or a belligerent,—as, for instance, the

<sup>1</sup> Halleck's Int. Law, chap. xxxiii.

<sup>2</sup> U. S. v. Cashill, 1 Hugh. 553.

<sup>3</sup> Coleman v. Tennessee, 97 U. S. State v. Rankin, 4 Coldw. 145.

courts organized under the provisional governments established by the United States government in the Southern States during the late war of 1861 to 1865,—are *res adjudicata* in the same manner as judgments of ordinary civil tribunals. The power to create civil courts exists by the laws of war in places held in firm possession by a belligerent military occupant; their judgments and decrees are binding on all parties during the period of such occupation as the acts of a *de facto* government, and have the like binding effect when pleaded as *res adjudicata* before the regular judicial tribunals of the country after the return of peace.<sup>1</sup>

§ 435. Among the various other inferior tribunals that are properly termed inferior courts is a county board of Commissioners, Supervisors, Selectmen, County Courts or by whatever name known in the various States, the body authorized by statute to levy taxes, audit and order the payment of claims, &c., of municipal corporations. When a board of this kind act they act judicially as a general rule, their proceedings are matters of record as much so as if they were legal tribunals for the trial of all classes of actions. They have a clerk whose duty is to make a record of all their proceedings and they can be shown only by the record. Whenever such a body in the exercise of jurisdiction acquired pursuant to statute does an act, audits a claim, levies a tax, orders a public road to be opened and the like, its action is judicial, and while its proceedings are subject to review by an appellate court, by writ of error or *certiorari*, such proceedings, unless reversed or set aside, are conclusive and binding upon the corporation and the claimant or petitioners, and cannot be collaterally impeached.<sup>2</sup> As for example after town-

<sup>1</sup> *Dynes v. Hoover*, 20 How. 65; *Hefferman v. Porter*, 6 Coldw. 391.

<sup>2</sup> *Gibson v. State*, 5 Lea, 161; *Hayes v. Rogers*, 24 Kas. 143; *Warren Co. v. Gregory*, 42 Ind. 32; *Blanchard v. Bissell*, 11 Ohio S. 96; *Argo v. Barthand*, 80 Ind. 63; *Fall v. Paine*, 23 Cal. 302; *Andrews v. People*, 84 Ill. 28; *People v. Brislin*, 80 Ill. 423; *Schertz v. People*, 105 Ill. 27; *Pitman v. Albany*, 34 N. H. 577; *Hume v.*

*Burton*, 1 Rid'g 43; *Fuller v. Elizabeth*, 42 N. J. L. 427; *State v. Vansardale*, 42 N. J. L. 536; *Marshall v. Gill*, 77 Ind. 402; *Miller v. Sanborn*, 54 Vt. 522; *Oxborough v. Boesser*, 30 Minn. 1; *Ellis v. Urham*, 91 Ill. 77; *Wild v. Deig*, 43 Ind. 455; *S. C.*, 13 Am. R. 399; *Breitwiser v. Fuhrman*, 88 Ind. 28; *Wright v. Wells*, 29 Ind. 354; *Green v. Elliott*, 86 Ind. 53; *Gibson v. State*, 5 Lea, 161; *Hayes v.*

ship trustees have passed upon the sufficiency of a petition presented to them, calling for an election to decide the question of levying a tax in aid of the construction of a railroad, and the election has been ordered and the tax voted and levied, the validity of such tax cannot be assailed on the ground that the petition was not signed by one-third of the resident taxpayers. The trustees having jurisdiction to determine that question, their decision cannot be collaterally assailed, but like any other judicial determination remains conclusive until reversed or set aside by writ of error, *certiorari*, or other direct proceeding provided by law.

The petition for the vote stands in substantially the same relation to the subsequent proceedings as an original notice or summons does to the proceedings which it inaugurates. If it is defective in fact, but is adjudged sufficient by the tribunal having jurisdiction to decide upon it, such adjudication becomes conclusive until reversed or set aside upon an appeal, writ of error, *certiorari*, or the like.<sup>1</sup>

§ 436. Among the acts of the various tribunals belonging to this class is the action of a board of County Commissioners, Supervisors or a County Court in the allowance of a claim.<sup>2</sup> The same matter can not be relitigated between the

Rogers, 24 Kas. 143; State v. Augusta, 46 Me. 127; Rominger v. Simmons, 88 Ind. 453; McIntire v. Marine, 93 Ind. 193.

<sup>1</sup> Cooper v. Sunderland, 3 Iowa, 114; Morrow v. Weed, 4 Iowa, 77; Dishon v. Smith, 10 Iowa, 212; Lynde v. Winnebago, 16 Wall. 6; Rock Creek v. Strong, 96 U. S. 271; Ryan v. Varga, &c. Co., 37 Iowa, 78; Commissioners v. Hall, 70 Ind. 469.

<sup>2</sup> Colusa County v. De Jarnette, 55 Cal. 373; Tilden v. Supervisors, 41 Cal. 68; Handblower v. Duden, 35 Cal. 664; El Dorado v. Elstner, 18 Cal. 144; Falls v. Paine, 23 Cal. 302; Raley v. Guinn, 76 Mo. 263; Hancock v. Binford, 70 Ind. 208; Lincoln v. Simmons, 39 Ark. 485; Rieffe v. Connor, 10 Ark. 241; Brandenburg v. State,

24 Ark. 50; Patterson v. Temple, 27 Ark. 202; Kirsch v. Lincoln, 36 Ark. 589; Peay v. Duncan, 20 Ark. 85; Jessup v. Spears, 38 Ark. 457; Argo v. Barthand, 80 Ind. 63; O'Connor v. Boylan, 49 Mich. 209; Harding v. Montgomery, 55 Iowa, 41; Commissioners v. Applewhite, 62 Ind. 464; Commissioners v. Binford, 70 Ind. 208; Campbell v. Commissioners, 71 Ind. 185; Commissioners v. Hall, 70 Ind. 469; State v. Benson, 70 Ind. 494; Brennen v. N. Y., 8 Daly, 426; State v. County, 25 Minn. 22; Commonwealth v. Knox, 1 Pennypacker, 478; Northumberland v. Bloom, 3 W. & S. 542; Blackmore v. Alleghany, 51 Pa. St. 160; Siggins v. Commonwealth, 85 Pa. St. 278; Northampton v. John, 24 Pa. St. 305; Glaffelter v.

same parties; the allowance and payment of such claim is a judgment and merger. The approval of an official bond.<sup>1</sup> So where the law has committed to a certain body the duty of acting as judges or inspectors of election and canvassing the returns and determining the result of an election from them, and such duty has been performed, and a determination made, the question of the effect of the returns made is not open in an action in which the title of an officer to his office comes up collaterally.<sup>2</sup> So the judgment of a superintendent of a road, which is intended to be final against a contractor is obligatory on a board under whose direction the improvements are made.<sup>3</sup>

§ 437. Counties estopped by the acts of its Commissioners, Supervisors, County Court or Trustees.—“A board of county commissioners is not a court in such sense that its record may be pleaded in bar as evidence of a former recovery, or as *res adjudicata* in respect to a claim against the county allowed by the board. While not a court, it is the agent of the county in regard to all matters within the scope of its agency. As to all such matters requiring discretion and determination, their acts are *quasi* judicial and binding upon the county until set aside for fraud or collusion in a direct proceeding brought for that purpose; but those involving the exercise of no judgment, are ministerial, and, if erroneous, are void. They are representatives or agents of the county for certain specified purposes; their action, within the scope of their powers, is the action of the county itself, and, in the absence of any charge of mistake or fraud, absolutely conclusive against it. For, while there may be given the right of appeal, this does not apply to the county, as it would be anomalous—not to use any stronger term—to say that the county could appeal from the act of its own agent. Hence, when the board has acted upon any matter within its jurisdiction, such action, even though erroneous, is final so far as the county is concerned, and the only remedy is that to which all other persons, natural as well as arti-

Commonwealth, 74 Pa. St. 74; Wilson v. Clarion, 2 Pa. St. 17; Howe v. Newbegin, 34 Me. 15.

<sup>1</sup> Bay v. Brock, 44 Mich. 45; Booth, in re, 64 Ala. 312; People v. Supervisors, 10 Cal. 344.

<sup>2</sup> Hadley v. Albany, 33 N. Y. 603;

Brevard v. Hoffman, 18 Md. 479; Commonwealth v. Garrigues, 28 Pa. St. 9; Waygood v. James, L. R. 4 C. P. 361; Gordon v. Farrar, 2 Doug. (Mich.) 411.

<sup>3</sup> Mercer Board v. Dougherty, 3 B Mon. 446.

ficial, must resort, who are so unfortunate as to employ faithless or incompetent agents, viz.: to discharge those who have proved themselves to be inefficient or unworthy of trust, and employ others who are more honest and efficient."<sup>1</sup>

§ 438. Such adjudications not subject to collateral attack. Among the various powers conferred upon this class of tribunals is that of exclusive control over the county highway. There has been a vast amount of litigation growing out of the exercise of this power. In a late case involving some of the matters incident to such exercise of authority, it was said, "It was shown by the complaint in the case now before us, that the board of commissioners, upon the presentation of the petition and the filing of the bond, did appoint three viewers, and directed them to meet, on a day named, at the office of the county auditor. When an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its determination thereon is conclusive as against collateral attack, and that, in such proceedings as that under consideration, the filing or presentation of the petition calls into exercise the jurisdiction of the board, and authorizes that body to determine, not only whether the petition is properly signed by the requisite land-owners, but every other fact necessary to the granting of the prayer of the petition; for instance, in this case, whether the proposed improvements, its kind, and the points between which it was to be made, and the like, were sufficiently stated. And it is not necessary that the record of the board shall show an express finding upon such facts. Such finding will be presumed in support of the proceedings, if the record shows an order granting the petition or for the taking of the steps necessary to the accomplishment of the end designed. In this case the order for the appointment of the viewers and engineers, and fixing the time and place of their meeting, is equivalent to a finding of the facts necessary to have been found, and to an adjudication of the board, that the petition itself is sufficient. By the presentation of the petition, the judgment of the board upon its sufficiency was invoked, and their judgment in this respect, as much as in other respects, is exempt from collateral attack." The doctrine here declared is fairly deducible from, and fully accords

<sup>1</sup> *Richland v. Miller*, 16 S. C. 244.

with, the law as expressed in a long line of decided cases in this court.<sup>1</sup>

§ 439. Conclusiveness of such adjudications upon subsequent boards, &c. It is a well settled principle that a judgment when once it has become final is not subject to review by the same court after a certain time fixed by statute. The same principle applies in the case of a county board of supervisors, auditors, and that class of *quasi* judicial bodies, as, for instance, where the statute made it the duty of the auditor to audit and adjust the accounts of public officers, and to state and certify such accounts. Transcripts from the books and proceedings of the auditor were made presumptive evidence in any civil cause. *Held*, that after the accounts of a public officer had been in due form audited by the auditor and settled by the officer, a subsequent auditor had no power to open and restate the account. The court gave the following as the ground of its decision: "The office of auditor, though filled by successive incumbents, is a continuous thing. Each of the several incumbents has the same powers, and only the same powers, neither is clothed with revisory powers over the other. When the auditor states and certifies an account against a tax collector, it becomes *prima facie* a correct account. A restatement by a subsequent auditor can only be *prima facie* correct. Which, *prima facie*, or presumptive proof shall overcome the other? The law has not declared that the later stated account shall prevail over the former. The law has said nothing on the subject. Is it implied in the nature of the duty? Many reasons in addition to those stated above combine to force us to the conclusion that the auditor has no power to correct errors he

<sup>1</sup> *Million v. Commissioners*, 89 Ind. 13; *R. R. v. Evansville*, 15 Ind. 395; *Snelson v. State*, 16 Ind. 29; *Spaulding v. Baldwin*, 31 Ind. 376; *Dequindre v. Williams*, 31 Ind. 444; *Ney v. Swinney*, 36 Ind. 454; *Stoddard v. Johnson*, 75 Ind. 20; *Tp. Co. v. Barnard*, 40 Ind. 146; *Worthington v. Dunkin*, 41 Ind. 515; *Gavin v. Graydon*, 41 Ind. 559; *Curry v. Miller*, 42 Ind. 320; *Board v. Markle*, 46 Ind. 96; *Evans v. Clermont*, 51 Ind. 160; *Mar-*

*kle v. Board*, 55 Ind. 185; *Faris v. Reynolds*, 70 Ind. 359; *Board v. Hall*, 70 Ind. 469; *Miller v. Porter*, 71 Ind. 521; *Mullikin v. Bloomington*, 72 Ind. 161; *Hume v. Assn.*, 72 Ind. 499; *Porter v. Stout*, 73 Ind. 3; *Hauk v. Barthold*, 73 Ind. 21; *Muncey v. Joest*, 74 Ind. 409; *Breitwiser v. Fuhrman*, 88 Ind. 28; *Rominger v. Simmons*, 88 Ind. 453; *McIntyre v. Marne*, 93 Ind. 193.

may detect in the accounts stated, certified and collected by any of his predecessors, and thus make such restated account a *prima facie* charge against the officer. We state but one which we consider conclusive. If the auditor can restate one account he can overhaul any number, and as the statute of limitations against the State is twenty years, he can extend his investigation back that number of years. Such a rule would be so harassing that we cannot believe the Legislature intended it.” A question arose as to the power of a succeeding board to review and readjust the action of their predecessors. The court said, “Doubtless, if a board of supervisors at one time act finally upon a matter of which they have jurisdiction, and as to which they have a lawful right to act, a succeeding board may not undo what they have done, to the immediate detriment of third parties.”<sup>2</sup> An attempt was made by a succeeding auditor to correct an alleged mistake of his predecessor, in settling with the sheriff, who was tax collector, for revenue collected by him. Speaking of the acts of the auditor, as affecting the State, the court said, “He was her accredited organ, with full power and discretion to settle, and record as settled, accounts of sheriffs for revenue due to her. \* \* His adjustment, once closed and registered by him, was made conclusive, unless changed by a direct judicial proceeding for the purpose of correcting any error or mistake committed by him. \* \* \* The auditor himself was *functus officio*, and could not change the registered account by his own act. \* \* \* And, of course, his successor could make no correction, and especially after two years, within which period even a suit for correction is expressly limited by law.”<sup>3</sup>

§ 440. The general principle, which is of universal application, is, that whatever is properly submitted to be decided by the discretion of a man, or a board of men, when so decided, cannot be revised by another tribunal unless there is some statutory mode

<sup>1</sup> State v. Brewer, 59 Ala. 130; Randolph, in re, 2 Brock. 447; U. S. v. Bank, 15 Pet. 377.

<sup>2</sup> Supervisors v. Ellis, 59 N. Y. 620; Supervisors v. Briggs, 2 Denio, 26.

<sup>3</sup> Hobson v. Commonwealth, 1 Duval, 172; Yallabusha v. Cartry, 11

Miss. 529; Mobile v. Huggins, 8 Ala. 440; Arthur v. Adam, 49 Miss. 404; U. S. v. Jones, 8 Pet. 375; Porter v. Directors, 18 Pa. St. 144; Middletown v. Miles, 61 Pa. St. 290; Burnet v. Auditor, 12 Ohio, 54; Kendall v. U. S., 12 Pet. 524.

of review, by appeal or *certiorari*.<sup>1</sup> Such determinations are final and conclusive upon the parties, and are not subject to collateral attack from any quarter. Thus a judgment rendered by a competent court charged with special statutory jurisdiction, and when all the facts necessary to the exercise of the jurisdiction are shown to exist, is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction, as a judgment condemning land for railroad purposes,<sup>2</sup> nor can a court, unless power has been conferred by statute, supervise or correct the proceedings of a board of railroad commissioners.<sup>3</sup> This doctrine is applicable to county courts or county commissioners, boards of supervisors, boards of police commissioners,<sup>4</sup> a register in chancery in the appointment of a trustee,<sup>5</sup> the determination of commissioners under acts of Congress.<sup>6</sup> So the decision of the proper officers as to the aptness of time and sufficiency of proofs required in the several steps to perfect title to land from the government, under the pre-emption laws, in the absence of fraud, imposition or mistake shown by the party alleging it, is conclusive.<sup>7</sup> This principle applies to the decision of the commissioner of patents.<sup>8</sup> So in a case where the Legislature had granted authority to counties to

<sup>1</sup> Conn. &c. Co. v. Bailey, 24 Vt. 405.

<sup>2</sup> Secombe v. Railroad Co., 23 Wall. 108; R. R. Co. v. R. R. Co., 17 W. Va. 812; Butman v. R. R. Co., 27 Vt. 509; Allen v. R. R. Co., 15 Hun, 80; Evans v. Haefner, 29 Mo. 141; Houston v. R. R. Co., 4 Ohio St. 685; Read v. Ry. Co., 1 H. & S. 125; Reg. v. Ity. Co., 3 E. & B. 443; Chapman v. Ry. Co., 2 H. & N. 267; Newbold v. Ry. Co., 14 C. B. N. S. 405; Barber v. Canal Co., 15 C. B. N. S. 726; Townsend v. R. R., 91 Ill. 545; R. R. Co. v. Pound, 22 Ill. 399.

<sup>3</sup> Visscher v. Hudson River R. Co., 15 Barb. 37.

<sup>4</sup> Carroll v. Board of Police, &c., 28 Miss. 38; Knowles v. Muscatine, 20 Ia. 248; Bernal v. Lynch, 36 Cal. 135.

<sup>5</sup> Gaines v. Harrison, 19 Ala. 491.

<sup>6</sup> Brown v. Jackson, 7 Wheat. 218; Le Roy v. New York, 4 Johns. Ch. 353; Stephens v. Coburn, 2 Call. 440; Archer v. Bacon, 12 Mo. 149; La Roche v. Jones, 9 How. 155.

<sup>7</sup> Johnson v. Tow-ley, 13 Wall. 72; Samson v. Smiley, 13 Wall. 91; Robbins v. Bunn, 54 Ill. 48; Warren v. Van Brunt, 19 Wall. 646; Finley v. Woodruffe, 8 Ark. 328; Danforth v. Morical, 84 Ill. 456; McConnell v. Wilcox, 2 Ill. 344; Carey v. Brown, 58 Cal. 180.

<sup>8</sup> Jackson v. Lawton, 10 Johns. 23; Rubber Co. v. Goodyear, 9 Wall. 788; Eureka Co. v. Bailly, 11 Wall. 488; Field v. Seabury, 19 How. 33; De Florer v. Reynolds, 14 Blatchf. 505; Porie v. Wells, 6 Col. 406; Refining Co. v. Green, 4 McCrary, 232.

grant ferry privileges, the court said: In granting or refusing a ferry privilege the county court acts judicially, and its judgment is conclusive on all persons who have no other than a public interest in the proceeding; but does not conclude any one whose private interest has been invaded, unless he by voluntary appearance is a party to the proceeding. When a county court permits a ferry to be established, at or near a town, within one mile of a ferry previously established, the question whether the public convenience required the establishment of the rival ferry is necessarily passed upon and determined.<sup>1</sup> Whenever a tribunal is established by statutory authority, its determinations, within the scope of its jurisdiction, are as binding and conclusive, unless reversed by a superior tribunal, as the determinations of any court of exclusive jurisdiction.<sup>2</sup> As an illustration of the conclusiveness of such adjudications, not only upon the parties but on the courts rendering the judgment, a recent case may be referred to. The plaintiff was appointed police clerk in the city of New York by virtue of a law which authorized police justices to appoint assistant clerks deemed necessary by the board of supervisors, and declared that their salary be fixed by the supervisors. It also provided that the common council or supervisors may increase the salary of any officer mentioned in that act, and declares the salary of police court clerks to be the same as fixed by law before that act for police justices' clerks. The plaintiff was appointed by one of the justices on the 1st of May, 1870, and the board of supervisors on the 26th fixed his salary "at the same amount now allowed to police court clerks." The salary of police court clerks had been established at \$1,458 per annum; the common council increased it to \$2,500 by virtue of the act of 1860. In 1869 the common council again fixed it at \$4,000. *Held*, that the last increase was invalid, and that the salary recoverable was \$2,500 per annum. Having once authorized an increase, the common council had exhausted its power, and was expressly prohibited from making any further increase.<sup>3</sup> The increase authorized by the act of 1860 is for additional duties

<sup>1</sup> *Lindsay v. Lindley*, 20 Ark. 573;  
*Murray v. Menefee*, 20 Ark. 561.

<sup>2</sup> *U. S. v. Flint*, 4 Sawyer, 43; *People*

*v. Bank*, 4 Bosw. 363; *Cassidy v. Carr*, 48 Cal. 339.

<sup>3</sup> *Smith v. Mayor*, 3 T. & C. 160;  
*Drake v. Mayor*, 7 Lans. 341.

imposed. The exercise of that power was a judicial act, and having once been exercised could not be repeated, reversed or annulled by the same body.<sup>1</sup>

Where a statute provides for a special proceeding, such as assignments and the distribution of the estate of the insolvent, all parties filing their claims with the assignee, receiver or trustee, whether residents of the State where the assignment is made or not, are bound by the proceedings. So a creditor who files his claim under an attachment proceeding becomes a party thereto, and is concluded by the judgment.<sup>2</sup>

§ 441. Decisions made by the land officers upon questions of fact in the disposition of the public land, where all parties in interest have had notice, and a fair and impartial hearing has been had, will not be reviewed by the courts.<sup>3</sup> So the decision of the Land Commissioner and his award of a patent is conclusive upon the courts, with regard to contested claims for rights of entry, except where they have misconstrued the law, or for fraud or misrepresentation.<sup>4</sup> So are the rulings of land officers as to rights of claimants' action of Secretary of Treasury in distribution of fines and penalties.<sup>5</sup> So a compromise by authority of the Land Commissioner of the United States.<sup>6</sup> Decision of the Commissioner of Internal Revenue is in the nature of an award, binds both the claimant and the Government, and cannot be impeached for error.<sup>7</sup> The certificate of the Comptroller of the currency is conclusive as to the regularity of the proceedings by which any bank has been converted into a national bank.<sup>8</sup>

<sup>1</sup> Drake v. Mayor, 19 A. L. J. 420.

<sup>2</sup> Trentman v. Wiley, 85 Ind. 33; R. R. Co. v. Glass Co., 84 Ind. 516.

<sup>3</sup> Hosmer v. Wallace, 47 Cal. 416; Gray v. McCance, 14 Ill. 343; McGehee v. Wright, 16 Ill. 555; Rutledge v. Murphy, 51 Cal. 388; Mitchell v. Cobb, 13 Ala. 137; Henry v. Welsh, 4 La. 547; Primot v. Thibodeaux, 6 La. 10; Kerby v. Fogleman, 16 La. 277; Lewis v. Lewis, 9 Mo. 183.

<sup>4</sup> Miller v. Gibbons, 34 Ark. 212; Quimby v. Conlan, 104 U. S. 420; Wells v. Mickles, 104 U. S. 444; O'Connor v. Frasher, 56 Cal. 499;

Refining Co. v. Kemp, 104 U. S. 636; Knight v. Leary, 54 Wis. 549; Mace v. Merrill, 56 Cal. 554; Brewer v. Hall, 36 Ark. 334; Steinback v. Perkins, 58 Cal. 86.

<sup>5</sup> Kinney v. Degman, 12 Neb. 237; Rush v. Valentine, 12 Neb. 513 (Receiver and Register of the Land office); McConnell v. Wilcox, 2 Ill. 344.

<sup>6</sup> Kellogg v. U. S., 15 Ct. of Claims, 372; Camp v. U. S., 15 Ct. of Clms, 469.

<sup>7</sup> Wells v. Nickles, 104 U. S. 444.

<sup>8</sup> Bank v. U. S., 15 Ct. of Cl. 225.

<sup>9</sup> Keyser v. Hitz, 2 Mackey, 473

or as to the necessity of an assessment on the stockholders in winding up its affairs.<sup>1</sup>

Thus it is the duty of the Commissioner of Pensions to judge and determine all applications for pensions, and to construe and interpret all questions which may arise as to the construction of the several acts of Congress relating to pensions, subject only to the direction of the secretary of war and navy, to whom an appeal may be made. The commissioner of pensions, aided by the secretary of war or navy, constitute a special tribunal *ad hoc*, and its judgments, decrees and awards are necessarily final and conclusive. The commissioner of pensions is the exclusive judge of the law and the facts in all cases within the scope of his authority, subject to appeal to the secretary of war or navy. Thus a decree awarding a pension to certain persons, naming them, as children of a deceased widow who was entitled to a pension under an act of Congress but did not draw it, when in fact only part of the children were named, is conclusive upon those not named, and can only be corrected upon re-examination by the commissioner at his discretion subject to appeal to the proper secretary.<sup>2</sup>

So where a statute provides that upon the application of certain parties and proper showing that the provisions of the statute have been complied with, certain commissioners shall draw their warrant if satisfied that the parties have complied with the provisions, their determination is a final judicial decision<sup>3</sup> and cannot be questioned in a collateral action. But where the record does not contain the required jurisdictional facts, as where in the records of a commissioner's court for the assessment of revenue and establishment of roads and other county business, a statute requires in the establishment of new road that thirty days' notice of the application be given, and it appears that it had not been given, a decree establishing such

<sup>1</sup> Strong v. Southworth, 8 Ben. 331; Keyser v. Hitz, 2 Mackey, 473.

<sup>2</sup> Stokely v. De Camp, 2 Grant's Cas. 17.

<sup>3</sup> Houston, &c. Co. v. Randolph, 24 Tex. 317; Sutherland v. De Leon, 1 Tex. 250; Wiley v. Kelsey, 9 Ga. 117;

Rice v. Commissioner, 13 Pick. 225; Baker v. Chisholm, 3 Tex. 157; Arberry v. Beavers, 6 Tex. 469; Towne v. Leach, 32 Vt. 747; Lowmsbery v. Rakestraw, 14 Kas. 151; McCabill v. Equitable, &c. Co., 26 N. J. Eq. 531.

road is erroneous and properly quashed at the instance of the party injured.<sup>1</sup>

§ 442. An award ordinarily has the force of a judgment and concludes the parties from litigating the matters submitted to the arbitrators, on any subsequent occasion;<sup>2</sup> and when the submission is acquiesced in by both parties has as to them the effect of a final judgment.<sup>3</sup> Their jurisdiction is an exclusive jurisdiction created by the parties, and it cannot be shown that they proceeded on a mistake,<sup>4</sup> nor can the award be impeached at *nisi prius* for corruption.<sup>5</sup> But it may be shown that the arbitrators have exceeded their jurisdiction and adjudicated upon matters not submitted to them.<sup>6</sup> But the award itself cannot be contradicted or shown to mean something different from what it expresses.<sup>7</sup> If there is any doubt from the terms of the submission whether certain matters were submitted and passed on by the arbitrators, it is competent for the court, in an action upon the award, to admit evidence as to the truth of the facts of the case, and then to charge the jury as to the law applicable thereto.<sup>8</sup>

<sup>1</sup> Commissioners, &c. v. Thompson, 15 Ala. 134.

<sup>2</sup> Pease v. Whitton, 13 Me. 117; Rogers v. Holden, 12 Ill. 293; Brown v. Wheeler, 17 Conn. 345; Doe v. Prosser, 3 East, 15; Muirhead v. Kirkpatrick, 2 Pa. St. 425; Wright v. Bolton, 8 Ala. 545; Coming v. Heard, 10 B. & S. 606; Lloyd v. Barr, 11 Pa. St. 41; Bird v. Odem, 9 Ala. 755; Tyerman v. Smith, 37 E. L. & Eq. 66; Merrick's Estate, 5 W. & S. 9; Richardson v. Lanning, 26 N. J. L. 130; Brazill v. Isham, 12 N. Y. 9; Darlington v. Gray, 5 Whart. 487; Veghte v. Hoagland, 29 N. J. L. 125; Anding v. Levy, 60 Miss. 487; Allen v. Miller, 2 C. & J. 47; Gascoine v. Edwards 1 Y. & J. 19; Parkes v. Smith, 19 L. J. Q. B. 405; Cummings v. Heard, L. R. 4 Q. B. 669; Whitehead v. Tattersall, 1 A. & E. 491; Blake's Case, 3 Co. 342; Morris v. Creach, 1 Lev. 292; Smith v. Johnson, 15 East, 213; Dunn v. Murray, 9 B. & C. 780; Harper, in re, L. R. 10 C. H. App. 79; Morse v.

Bishop, 55 Vt. 231; Groat v. Pracht, 31 Kas. 656.

<sup>3</sup> Pensten v. Somers, 15 La. Ann. 679; Jarvis v. Fountain, &c. Co., 5 Cal. 179; Tomlinson v. Arriskin, Comyn, 330; Pickering v. Watson, 2 W. Black. 1117; Cayhill v. Fitzgerald, 1 Wils. 28; Fox v. Smith, 2 Wills. 267; Hawkins v. Colclough, 1 Burr. 274; Bacan v. Dubarry, 1 Ld. Raym. 247. See Baspole's Case, 8 Co. 98, a; Ormelade v. Coke, Cro. Jac. 354.

<sup>4</sup> Johnson v. Durant, 2 B. & A. 931; Ashton v. Poynter, 1 C. M. & R. 738; The Union, 20 Fed. R. 539.

<sup>5</sup> Wells v. Maccarnick, 2 Wils. 148; Braddick v. Thompson, 8 East, 314; Brazier v. Bryant, 3 Bing. 167.

<sup>6</sup> Butler v. Mayor, 1 Hill, 439; S. C., 7 Hill, 329.

<sup>7</sup> Doke v. James, 4 N. Y. 568; Rand v. Glenn, 2 Gill, 430; Hall, in re, 2 M. & G. 852; Veale v. Warner, 2 W. Sand. 530.

<sup>8</sup> Keaton v. Mulligan, 43 Ga. 308.

A submission to arbitrators which is the act of both parties, is more binding than the averments in a declaration, which proceeds only from one, and when the submission is of all matters in dispute, or is of all demands, the estoppel is co extensive with the submission. It cannot be shown that a particular demand was not laid before the arbitrators, for the obvious reason that the submission was the final adjustment and adjudication of every matter in controversy, and neither party is allowed to defeat it.<sup>1</sup> Thus where mutual claims were submitted by the defendant and the agent of the plaintiff, and the defendant was fully heard and the award was rendered against him, the defendant in an action on the award is estopped from denying its validity on the ground that the plaintiff's agent had no authority to make the submission.<sup>2</sup> In Massachusetts a different rule has been established, and either party has been allowed to introduce evidence that a particular demand had not been submitted to the arbitrators, although the submission purported to be of all demands, and a similar rule has been adopted in other states.<sup>3</sup> But the general tendency of the various courts is to limit this rule rather than extend it, on the principle of *interest reipublice ut sit finis litium*.<sup>4</sup> An award of arbitrators decides the rights of the parties as effectually as a judgment at law or a decree in

<sup>1</sup> Grazebrook v. Davis, 5 B. & C. 534; Thornbun v. Barnes, L. R. 2 C. P. 384; Jones v. Harris, 58 Miss 293; Smith v. Johnson, 15 East, 215; Johnson v. Durant, 2 B. & A. 925; Bailey v. Lechmere, 1 Esp. 377; Dicus v. Jay, 4 M. & P. 285; Owen v. Boeum, 23 Barb 187; Brazil v. Isham, 12 N. Y. 9; Bunnell v. Pinto, 2 Conn. 438; Wheeler v. Van Houten, 12 Johns. 313; Briggs v. Brewster, 23 Vt. 100; Dunn v. Murray, 9 B. & C. 780; Williams v. Danziger, 91 Pa. St. 232.

<sup>2</sup> White v. Fox, 29 Conn. 570.

<sup>3</sup> Edwards v. Stevens, 1 Allen, 315; Newman v. Wood, M. & Y. 190; Whittemore v. Whittemore, 2 N. H. 26; Engleman v. Engleman, 1 Dana, 437; Ravee v. Farmer, 4 T. R. 146; Martin v. Thornton, 4 Esp. 180; Bates

v. Townley, 2 Ex. 153; Newell v. Elliott, 1 H. & C. 797; Darlington v. Gray, 5 Whart. 437; Webster v. Lee, 5 Mass. 334; Hodges v. Hodges, 9 Mass. 320; Smith v. Whiting, 11 Mass. 447; King v. Savory, 8 Cush. 309; Bixby v. Whitney, 5 Me. 192; Buck v. Buck, 2 Vt. 420; Keaton v. Mulligan, 43 Ga. 308.

<sup>4</sup> R. R. Co. v. Bedford, 33 E. L. & Eq 92; Briggs v. Smith, 20 Barb. 409; Dunn v. Murray, 9 B. & C. 780; Cushing v. Babcock, 3 Me. 452; Warfield v. Holbrook, 20 Pick. 531; Robinson v. Morse, 29 Vt. 404; Trescott v. Baker, 29 Vt. 459; Robinson v. Morse, 29 Vt. 404; Briggs v. Brewster, 23 Vt. 109; Jones v. Harris, 58 Miss. 293.

chancery, and is as binding until regularly set aside, or its validity questioned in a proper manner.<sup>1</sup> When not made under a rule of court, it may be annulled by a decree in chancery, or on a bill showing corrupt practices of the arbitrators or parties, or the mistake of the former or any accident or proper grounds for a new trial attending the case of the losing party. But he can never overleap it treating it as void, and litigate it anew by commencing an action as if it had not been made, and in a collateral manner attack its validity.<sup>2</sup>

§ 443. At common law the award of arbitrators, regularly made and in relation to a matter which might have been submitted, is conclusive between the parties in a contest involving the same matter. They are as conclusive as the judgments of courts.<sup>3</sup> Choosing arbitrators, and they acting within the pale of their authority, the award becomes the act of the parties, and they are estopped by it. No action can be maintained to recover money paid under an award, on the ground that it was obtained fraudulently or by false testimony.<sup>4</sup> Nor can a defendant, when a suit is brought to enforce an award, set up anything as a defense which was a proper answer to the plaintiff's claim before the arbitrators.<sup>5</sup> If he has such a defense, it should be made before the arbitrators, and their award, whether right or wrong, is conclusive as long as they keep within the scope of their submission. An award extinguishes the original demand, and is a bar to any action upon it, and even when the award is made upon a parol submission, unless unconditionally revoked before

<sup>1</sup> Lloyd v. Barr, 11 Pa. St. 41; Pease v. Whitten, 31 Me. 117.

<sup>2</sup> Buckley v. Stewart, 1 Conn. 130; Ross v. Wait, 16 Ill. 99.

<sup>3</sup> Britt v. Pashley, 1 Exchq. 64; Lundsford v. Smith, 12 Gratt. 554; Buck v. Spofford, 35 Me. 526; Bower v. Tallman, 5 W. & S. 536; Morse v. Bishop, 55 Vt. 231.

<sup>4</sup> Bulkly v. Stewart, 1 Conn. 130; Woodrow v. O'Connor, 28 Vt. 776.

<sup>5</sup> Waite v. Barry, 12 Wend. 377; Muirhead v. Kirkpatrick, 2 Pa. St. 425; Price v. Williams, 1 Ves. Jr. 365;

Wood v. Griffith, 1 Swan, 52; Stiff v. Andrews, 2 Madd 6; Young v. Walter, 9 Ves. 364; Ching v. Ching, 6 Ves. 282; Atty. Genl. v. Jackson, 5 Hare, 355; Morgan v. Mather, 2 Ves. Jr. 15; Keeble v. Black, 4 Tex. 69; Bean v. Wendell, 22 N. H. 588; Pike v. Gage, 29 N. H. 470; Hale v. Handy, 26 N. H. 470; Jones v. Stevens, 5 Met. 373; Branscomb v. Bowcliffe, 6 C. B. 623; Whitehead v. Tattersall, 1 A. & E. 491; Smith v. R. R., 36 N. H. 458; Parkes v. Smith, 15 Q. B. 297.

the award is made.<sup>1</sup> But this rule of conclusiveness must be understood with this qualification, that the award is a valid and binding one, and the arbitrators must have had jurisdiction. So an award by a public officer which is paid by the United States, and accepted by the claimant, is conclusive and final and binding on both parties.<sup>2</sup> This doctrine of *res adjudicata* applies with equal force to an adjudication on the rights of conflicting claimants upon a referee's report.<sup>3</sup>

§ 444. Arbitrators acquire their jurisdiction or power from the agreement to submit, and this authority must be observed; it is this alone that gives them jurisdiction. The presumption is that they have acted within the scope of their submission, unless the contrary appears, and every reasonable intendment will be allowed to sustain an award. They must be certain, final and mutual.<sup>4</sup> Where the money is *expressed* to be in *satisfaction* of all matters, it is held to be sufficiently mutual, without awarding a release.<sup>5</sup> Here it seems to be necessarily implied.<sup>6</sup> So where it is awarded that all controversies shall cease, it has been held good without a release.<sup>7</sup>

And even further, where the award recited that *all* matters in difference had been referred, and then ordered a general verdict for the plaintiff for a certain sum, it was held sufficiently mutual and certain, although it was not expressed to be made "of and upon the premises."<sup>8</sup>

Hence it seems to follow, that to an action of debt on bond for not performing an award, or to an action on the award itself,

<sup>1</sup> Dilks v. Hammond, 86 Ind. 566; Griggs v. Seeley, 8 Ind. 264; Carson v. Earlywine, 14 Ind. 256; Miller v. Goodwine, 29 Ind. 46; Goodwine v. Miller, 33 Ind. 419; Shroyer v. Bash, 57 Ind. 349; Boots v. Canine, 58 Ind. 450; Webb v. Zeller, 70 Ind. 408.

<sup>2</sup> Gilbert's Case, 1 Ct. of Claims, 108; Kellog's Case, 1 Ct. of Clms. 310; Kendall v. U. S. 12 Pet. 524; Carnick v. U. S., 2 Ct. of Clms. 126.

<sup>3</sup> Leavitt v. Wooley, 95 N. Y. 212;

Hutton v. Lockridge, 22 W. Va. 159; Williams v. Batchelor, 90 N. C. 364.

<sup>4</sup> Wilson v. Wilson, 9 Exchq. 90; Danziger v. Williams, 91 Pa. St. 234.

<sup>5</sup> 1 Rol. Abr. 253, (X) pl. 4, 9.

<sup>6</sup> Nichols v. Grunnion, Hob. 49.

<sup>7</sup> Harris v. Knipe, 1 Lev. 58.

<sup>8</sup> Gray v. Givennap, 1 B. & A. 106; Brown, in re, 9 Ad. & El. 522; Dunn v. Walters, 9 M. & W. 293; Wyatt v. Curnell, 1 Dowl. N. S. 327; Duke v. Swansea, 8 C. B. N. S. 146.

the defendant cannot plead collusion or other misconduct of the arbitrators in avoidance.

§ 445. An award that proof sufficient had not been produced to establish a claim against the defendant, is equivalent to saying that the plaintiff had no cause of action, and is final and conclusive,<sup>1</sup> where it appears that the arbitrators have in all respects pursued and kept within the authority conferred upon them by the submission, and the award comes into question collaterally, in a court of law or equity, nothing *dehors* the award is in general admissible in evidence for the purpose of impeaching it, or avoiding its force or effect. An award, like a judgment of a court of concurrent jurisdiction, binds only parties and privies so as to estop them from again litigating the same subject matter which was determined by the award. Thus, in a suit to recover the first quarter's rent on an alleged parol lease, the defendant denied the lease and the occupation of the premises. An arbitration was had, which was agreed to be final, without exception or appeal. The award was for the defendant. In another action for the second quarter's rent, the award was held a good plea in bar of that action.<sup>2</sup> Strangers to the award can neither be benefited or prejudiced by it.

§ 446. A *feme covert* cannot as such bind herself or her husband by an award, unless she was acting as the agent of her husband, and the right to attack an award is confined to parties and privies; strangers or third persons cannot impeach it.<sup>3</sup> An award concludes the parties and those claiming under them, and one claiming under a party to the award may avail himself of it to conclude the other party and those claiming under him.<sup>4</sup> The testimony of an auditor, referee or arbitrator, to whom a case has been referred, is inadmissible to contradict or modify it.<sup>5</sup> *An award* is an entire thing, and cannot be affirmed in part and disaffirmed in part. Where one accepts a benefit under an

<sup>1</sup> McDermott v. Ins. Co., 3 Serg. & R. 604.

<sup>2</sup> Searle v. Abbe, 13 Gray, 409; Wall v. Fyfe, 37 Pa. St. 394; Danziger v. Williams, 91 Pa. St. 234.

<sup>3</sup> Penniman v. Patchin, 6 Vt. 325.

<sup>4</sup> Shelton v. Alcox, 11 Conn. 240.

<sup>5</sup> Packard v. Reynolds, 100 Mass.

153.

award he is estopped from denying its validity, and it is immaterial whether the award was made under the submission or not.<sup>1</sup>

§ 447. Civil courts have no ecclesiastical jurisdiction, and will not revise questions of church discipline. The decision of one of these judicatories is binding upon the civil courts where such questions arise. The mode of procedure, the question of notice, and all other matters of ecclesiastical practice are to be determined by the tribunal in which the proceedings are had. No civil tribunal can revise its judgments nor determine its mode of procedure.<sup>2</sup> So, where the highest tribunal of a church to which a question of discipline or church law is carried decides it, having jurisdiction according to the usages of the church, the decision binds the civil courts, and they will not review it. Thus, where the proper tribunal of a church has decided that certain members of a local church, under its jurisdiction, have seceded, the fact must be regarded as fixed, and it results as a consequence that they lose all right to the property of the body, though they constituted a majority of its members, and in such case the remaining members retain its ownership, control, and management.<sup>3</sup>

<sup>1</sup> Kellogg v. U. S., Nott & H. 310; Snow v. Walker, 42 Tex. 154; French v. New, 20 Barb. 481; Viele v. R. R. Co., 20 N. Y. 184; Danziger v. Williams, 91 Pa. St. 234; Snow v. Walker, 42 Tex. 154; Spencer v. Dearth, 43 Vt. 98; Neal v. Field, 68 Ga. 534; Wright v. Omnibus Co., 2 Q.B.D. 271; Grattan v. Ins. Co., 80 N. Y. 281.

<sup>2</sup> Friends v. Friends, 89 Ind. 136; Grimes v. Harmon, 35 Ind. 198; Connitt v. Church, 54 N. Y. 551; Watkins v. Wilcox, 66 N. Y. 654; Winnebrenner v. Colder, 43 Pa. St. 244; Den v. Bolton, 3 Green (N. J. E.) 322; Watson v. Jones, 13 Wall. 679; Harrison v. Hoyle, 24 Ohio St. 254; Chase v. Cheney, 58 Ill. 509; Church v. Witherell, 3 Paige, 296; Lawyer v. Cipperly, 7 Paige, 281; Smith v. Nelson, 18 Vt. 511; Church v. Seibert, 3

Pa. St. 282; McGinnis v. Watson, 41 Pa. St. 9; Gaff v. Greer, 88 Ind. 121; Commonwealth v. Green, 4 Whart. 599; Society v. Pellings, 24 N. J. L. 659; State v. Farris, 45 Mo. 183; Robertson v. Bullions, 9 Barb. 64; Gibson v. Armstrong, 7 B. Mon. 481; Harmon v. Dreher, 1 Speer's Eq. 87; Gable v. Miller, 10 Paige, 727; Shannon v. Frost, 3 B. Mon. 253; Forbes v. Eden, 1 S. & Ir. App. 618; Ackerly v. Parkinson, 3 M. & S. 411; Rex v. Grondon, 1 Cowp. 315; State v. Congregation, 31 La. Ann. 205; Lucas v. Case, 9 Bush, 297; State v. Society, 15 La. Ann. 73; Rosh's Appeal, 69 Pa. St. 462; S. C., 8 Am. R. 275; Schnorr's Appeal, 67 Pa. St. 138; S. C., 5 Am. R. 415; Sutter v. Churches, 42 Pa. St. 502; Watson v. Avery, 2 Bush, 232.

<sup>3</sup> Gaff v. Greer, 88 Ind. 122.

The Supreme Court of the United States, in a leading case, between two bodies of a Presbyterian church, each contending for the possession of the property, thus states the law: "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.

"The right to organize voluntary religious associations, to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.

"But it would be a vain consent, and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding, in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for."

"In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law, have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and as binding on them, in their application to the case before them."<sup>1</sup> In Kentucky, the court on a similar question, said: "This court, having no ecclesiastical jurisdiction, can not revise or question ordinary acts of church discipline or excis-

<sup>1</sup> *Watson v. Jones*, 13 Wall. 679.

ion. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. \* \* \* We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church."<sup>1</sup>

These general rules apply to benefit, charitable, and other societies, clubs, boards of trade—and generally, all associations who admit and expel members, whose proceedings are in accordance with the power vested in them by statute, and their determinations or judgments cannot be collaterally assailed in cases within their peculiar jurisdiction, provided they have lawful jurisdiction over the parties.<sup>2</sup>

§ 448. The decree of every court of competent jurisdiction on the point in issue before it can only be reviewed in the regular course of appeal, and as long as it continues in force, the decree, if it be a decree of a court of peculiar and exclusive jurisdiction in the case, is conclusive upon all other courts.<sup>3</sup> Thus the judgment of the U. S. Court of Claims from which no appeal is taken is as conclusive as a decision of a the U. S. Supreme Court.<sup>4</sup> So a decision of a superior court as to marshaling liens and distributing the proceeds of the sale of mortgaged property is conclusive in a probate court in subsequent proceedings of an assignee to administer the trust.<sup>5</sup> A former judgment which is clearly erroneous in law, until reversed, binds the parties as an estoppel

<sup>1</sup> Shannon v. Frost, 3 B. Mon. 253.

<sup>2</sup> Society v. Bacher, 20 Pa. St. 425; Down v. Lent, 6 Cal. 94; Society v. Van Dyke, 2 Wheat. 309; Holroyd v. Breare, 2 B. & A. 473; Commonwealth v. Society, 8 W. & S. 247; Commonwealth v. Society, 15 Pa. St. 251; Anacosta v. Murbach, 13 Md. 91; Delaney v. Nav. Co., 1 Hawks, 274; Innes v. Wylie, 1 C. & K. 257; Reg. v. Company, 10 H. L. Cas. 404.

<sup>3</sup> Cemetery Co. v. People, 93 Ill. 619; Parker v. Wright, 63 Ind. 398; Heroman v. Louisiana Inst., 34 La. Ann. 805; Billings v. Russell, 23 Pa.

St. 189; Tompkins v. Hyatt, 28 N. Y. 347; Jones v. Knox, 51 Ala. 367; Milhous v. Arcandi, 51 Ala. 594; Thornton v. Hogan, 63 Mo. 143; Seymour v. Street, 5 Neb. 85; Grayson v. Weddle, 63 Mo. 523; Montgomery v. Johnson, 31 Ark. 71; Dayton v. Mintzer, 22 Minn. 293; Gelston v. Hoyt, 1 John. Ch. 543. Allie v. Schnitz, 17 Wis. 169; Goss v. McClaren, 17 Tex. 207.

<sup>4</sup> O'Grady's Case, 10 Ct. of Claims, 34; S. C., 22 Wall. 641; Russell, in re, 13 Wall. 664.

<sup>5</sup> Hellebush v. Richter, 27 Ohio St. 222.

upon every question which it in fact decided, and precludes them from denying, in any subsequent action, either the facts or the law upon which it proceeded.<sup>1</sup>

§ 449. A person having the choice of two remedies can prosecute but one of them to judgment. Thus, where a contract was held subject to two constructions, either of which was open to the plaintiff at his election, having made his election and enforced it by suit, he could not afterwards maintain another action based on the other construction of the same contract, as the judgment in the first suit was a bar.<sup>2</sup> So where A. paid \$300, on account of board, and to avoid the displeasure of his wife took the creditor's note for the same amount, after a judgment obtained by her as his executrix, on the note, she could not set up the payment in defense against the creditor's action against her for the balance of the account.<sup>3</sup> So after the recovery of a judgment in garnishment against "A." as the vendee of certain goods from B., "B.'s" creditors cannot attach the goods on the ground of fraud in the sale to "A." A party cannot maintain such inconsistent positions affirming at one time that it was valid and then that it is void as to creditors; by obtaining judgment against the vendee in garnishment proceedings, they must have elected to treat the sale as valid. So where a vendor sells goods for cash and obtains a redelivery by replevin it disaffirms the sale and he cannot maintain an action for the price of the goods, for it is extinguished.<sup>4</sup> A party cannot affirm

<sup>1</sup> Birkhead v. Brown, 5 Sandf. 151; Beloit v. Morgan, 7 Wall. 621; Gould v. R. R. Co., 91 U. S. 526; Rakes v. Pope, 7 Ala. 161; Tarleton v. Johnson, 25 Ala. 300; State v. Miller, 50 Mo. 129; Patterson v. State, 2 Greene (Ia.) 492; Tucker v. Harris, 13 Ga. 1; Bradwell v. Spencer, 16 Ga. 578; Rodgers v. Evans, 8 Ga. 143; Kernan v. Miller, 2 Ga. 325; Chestnut v. Marsh, 12 Ill. 173; Mayor v. Shaw, 14 Ga. 162; Lamprey v. Nudd, 29 N. H. 299; Mills v. Alexander, 21 Tex. 154; Armfield v. Moore, Busb. L. 157; Garvin v. Gradin, 41 Ind. 559; Moore v. Ware, 51 Miss. 206; Gunn v. Plant, 94 U. S. 664; Lancaster

v. Wilson, 27 Gratt. 624; Willis v. Ferguson, 46 Tex. 496; Wing v. Dodge, 80 Ill. 564; Sutherland v. De Leon, 1 Tex. 309; Mitchell v. Menley, 32 Tex. 465; Withers v. Patterson, 27 Tex. 495; Jackson v. Delancey, 13 Johns. 537; Farrar v. Olmstead, 24 Vt. 123.

<sup>2</sup> Bickford v. Cooper, 41 Pa. St. 142; Ins. Co. v. Young, 1 Cranch, 340; Goodrich v. Yale, 97 Mass. 15; Cranston v. Smith, 47 Mich. 647; Oglesby v. Attrill, 20 F. R. 470; Roberts v. Lovejoy, 60 Tex. 233.

<sup>3</sup> Lilley v. Adams, 108 Mass. 50.

<sup>4</sup> Morris v. Rexford, 18 N. Y. 552; Carter v. Smith, 23 Wis. 497; Geisse v. Beall, 3 Wis. 367; Allen v. Roose-

a contract in part and rescind it in part. A party having an election to rescind a contract, must rescind it wholly, or in no part; he cannot consider it void to reclaim his property or the value thereof, and at the same time consider it in force for the purpose of recovering thereon; nor can a contract be rescinded to one party and remain in force as to the other. So where a judgment is recovered by the plaintiff against the defendant, for a breach of contract in misappropriating moneys entrusted to him to purchase goods for the plaintiff, such plaintiff is estopped from claiming ownership of the goods purchased, both as against the defendant and any subsequent purchaser; and where an action is brought by a subsequent purchaser of the goods, against his vendee, for the price of the goods, such vendee is estopped from setting up as a defense that the plaintiff in the judgment is the true owner, and that he has paid him the price of the goods as such.<sup>1</sup> In tort by A. against B. and C., the declaration alleged that A. employed C. to buy goods for him, and that C. sold them to B. without authority, and that B. and himself converted them to their own use. B.'s answer set up that he bought them in good faith from C., who was authorized to sell them; and that they had been seized by A., against whom B., had recovered judgment in trover. In the suit against himself, A. answered that the goods were bought with his money, that B. never had any title to them, and paid no money for them in good faith, but conspired with C., to defraud A. It appeared that B.'s suit was tried on these issues, and that judgment was rendered for B. Such judgment was held a bar to A.'s action, so far as B. was concerned.<sup>2</sup>

§ 450. Where money has been paid by the party, either plaintiff or defendant, which is afterwards discovered not to be due, or that it has been paid twice, the party making the double payment cannot recover it back in an action for money had and received. In the case of *Mariott v. Hampton*,<sup>3</sup> a case cited per-

velt, 15 Wend. 100; *Rodermund v. Clark*, 46 N. Y. 354; *Meyer v. Clark*, 45 N. Y. 286; *Monette, Succession of*, 26 La. Ann. 26; *Wheeldon v. Landraux*, 26 La. Ann. 729; *Connihan v. Thompson*, 111 Mass. 270; *Sloan v. Holcomb*, 29 Mich. 153; *Ross v. South-*

*western, &c. Co.*, 53 Ga. 514; *Ware v. Percival*, 61 Me. 394.

<sup>1</sup> *Bank v. Beale*, 24 N. Y. 473; *Howell v. Earp*, 21 Hun, 398; *Caylus v. R. R.*, 76 N. Y. 609.

<sup>2</sup> *Morse v. Elms*, 131 Mass. 151.

<sup>3</sup> 7 T. R. 269.

haps more than any other on this subject, which has been heretofore referred to, in illustrating the doctrine of *res adjudicata*, Lord Kenyon, in delivering the opinion of the court, stated, "that after money had been paid under legal process, it could not be recovered back again, however unconscientiously retained. In an action for the recovery of the money," he said, "I am afraid of establishing such a precedent. If this action could be maintained, I know not what cause of action ever could be at rest. After a recovery by process at law, there must be an end to litigation, otherwise there would be no security for any person. I cannot, therefore, grant a rule to show cause, lest it should imply a doubt. It would tend to encourage the greatest negligence if we were to open the door to parties to try their causes again, because they were not properly prepared the first time with their evidence; were it so, every species of evidence which was omitted by accident, to be brought forward and used at the trial, might be made available in a new action to overhaul the former judgment, which is too preposterous to be stated. Where there is *bona fides*, money paid under compulsion of law cannot be recovered back as money had and received, and where it is paid with full knowledge of facts, though there be no debt, still it cannot be recovered back in a new suit founded on matter that would have been a defense to a former action.<sup>1</sup> In accordance with the maxim, '*Ignorantia juris excusat neminem ignorantia facti excusat*,' even equity will not grant relief in such a case."

<sup>1</sup> Allison's Case, L. R. 9 Ch. App. 24; Heath v. Frackelton, 20 Wis. 320; De Cadaval v. Collins, 4 A. & E. 867; Wilson v. Cameron, 1 Kerr (N. B.) 542; Phillips v. Hunter, 2 H. Bl. 410; Homer v. Fish, 1 Pick. 436; Thacher v. Gammon, 12 Mass. 268; Footman v. Stetson, 32 Me. 17; Brown v. McKinnally, 1 Esp. 277; Hamlet v. Richardson, 9 Bing. 644; Belcher v. Mills, 5 Tyrwh. 715; Harris v. Lloyd, 5 M. & W. 432; Kist v. Atkinson, 2 Camp. 63; Gower v. Papkin, 2 Stark. 85; Knibbs v. Hall, 1 Esp. 84; Skeate v. Beale, 11 A. & E. 793; Fisher v.

Samuda, 1 Camp. 109; De Medina v. Grove, 10 Q. B. 152; Higgins v. Scott, 7 C. B. 63; Barber v. Pott, 4 Exchq. 759; Remfry v. Butler, E. B. & E. 887; Holland v. Russell, 1 B. & S. 424; Cave v. Mills, 7 H. & N. 913; Shaw v. Pietou, 4 B. & C. 715; Skyring v. Greenwood, 4 B. & C. 281; Platt v. Bromage, 24 L. J. Exchq. 63; Brisbane v. Dacies, 5 Taunt. 143; Marvin v. Mandell, 125 Mass. 563; Frambers v. Rusk, 2 Ill. App. 499; Windbrell v. Carroll, 16 Hun. 101; Carver v. U. S., 111 U. S. 609.

<sup>2</sup> Doyle v. Reilly, 18 Iowa, 108.

If a party pays a demand unjustly made upon him, and attempted to be enforced by legal process, he cannot recover the money back as paid by compulsion, unless there be fraud in the party enforcing the claim; and if the party may avoid paying it by pleading payment or any other defense in the action upon which the judgment is rendered, he is afterwards estopped from recovering it back. Money retained under the award of a tribunal clothed with the jurisdiction of the subject matter, and from whose decision there is no appeal, is in legal effect money paid under a judgment, and cannot be recovered back."

In Kentucky, money collected from a defendant through a judgment procured by fraud, may be recovered back from him by an action in equity, without vacating or otherwise setting aside the original judgment.<sup>1</sup>

§ 451. When process, either *mesne* or final, issues from a court having jurisdiction of the subject matter, such process issues to the sheriff or other proper officer, if *mesne* as a summons for the purpose of bringing the defendant into court, and thus gaining jurisdiction of the adversary parties; this becomes the foundation of a personal judgment, if the writ commanded a levy or seizure of real or personal property; this, with a strict compliance with the statutory requirements for constructive or service by publication, is the foundation of a judgment *in rem*; it is the proper legal service of these writs which gives a court jurisdiction; when these writs are executed the proceedings of the officer are indorsed thereon; it is signed by him in his official capacity, returned to the court from whence it emanated, is filed, and becomes part of the record in the case, with a similar effect as the pleadings in the action. It is not the filing of a petition or the commencement of an action which gives a court jurisdiction; it is the service of its process in the statutory mode, and this only, that can be the basis of a valid and conclusive judgment, founded upon jurisdiction; it becomes, therefore, essential to ascertain the effect of such officer's return. There has been no little discussion by courts *pro* and *con* on this question, and, in fact, many cases can be found where judgments

<sup>1</sup> *Ellis v. Kelly*, 8 Bush, 621; *West v. Kirby*, 4 J. J. Marsh. 56.

have been collaterally impeached, without any question being mooted as to the contradiction of such a return.

§ 452. When an officer returns a writ as duly served, the defendant is estopped from contradicting such return as against third parties who have acquired rights under the judgment of the court. This seems a somewhat harsh doctrine, but the remedy of the injured party is against the officer for making a false return. In the late case of *Stork v. Michael*, in the Supreme Court of Michigan, Judge Cooley, in reviewing many cases, said: "In a suit for false return the plaintiff is at liberty to show the false return by any evidence fairly tending to show it. He may do this by affidavit, on a motion in the same suit to set aside the return; and this is not an uncommon proceeding when the truth of a return is disputed.<sup>1</sup> It has also been held that the officer's return may be contradicted in equity in a proceeding instituted to set aside a judgment founded upon it.<sup>2</sup> It is also held that the officer's return is not conclusive as to the facts stated therein, which he must learn by inquiry of others; as, for example, that the person upon whom the process was served was the incumbent of a certain corporate office, such as that of president of a bank.<sup>3</sup> In Missouri it is held that a return of a writ in compliance with the law is conclusive upon the parties. Thus a return of a writ as served on 'O., president of the C. Savings Bank,' is conclusive that O. was the president at the time of service. The return is conclusive as to service; and a defendant will not be heard to deny it so as to show cause for a review by *certiorari* instead of by appeal.<sup>4</sup> A person not a party or privy to the proceeding in which the return is made is never concluded by it from showing the real fact.<sup>5</sup> And where suit is brought upon a foreign judgment, it seems to be competent to

*Chapman v. Cummings*, 17 N. J. 11; *Carr v. Bank*, 16 Wis. 50; *Bond v. Wilson*, 8 Kans. 228; S. C., 12 Am. Rep. 466.

<sup>2</sup> *Owens v. Ranstead*, 23 Ill. 161; *Newcomb v. Dewey*, 27 Iowa, 381; *Bank v. Eldredge*, 23 Conn. 556; *Bell v. Williams*, 1 Head, 229; *Ridgeway v.*

*Bank*, 11 Humph. 523.

<sup>3</sup> *St. John v. Bank*, 3 Stew. 146; *Rowe v. Table, &c. Co.*, 10 Cal. 411; *Wilson v. Spring, &c. Co.*, 10 Cal. 445. See *Chapman v. Cumming*, 2 Har. 11; *Sanford v. Nichols*, 14 Conn. 324.

<sup>4</sup> *State v. O'Neill*, 4 Mo. App. 221.

<sup>5</sup> *Nall v. Granger*, 8 Mich. 450.

disprove jurisdiction by showing, in contradiction of the officer's return, that no service was made upon the party defendant."<sup>1</sup>

There are authorities in some of the States, under statutory and other grounds, where it is held that an officer's return may be collaterally attacked.<sup>2</sup> But the general rule, in accordance with the great preponderance of authority, is: "An officer's return of service is conclusive upon the parties to the suit in which the process issues, when brought in question in a collateral suit or proceeding. Thus the return of a sheriff to a writ of replevin, in which he certified that the plaintiff in the suit had not filed a forthcoming bond, was conclusive upon the parties, and would preclude any such bond being set up."<sup>3</sup> This case is in entire accord with the English authorities,<sup>4</sup> and in accord with the great preponderance of authority in this country.

In New York the doctrine was strongly asserted in a case in which a constable had served his own process, which the law of that State allowed. "The constable's return," say the court, "is conclusive against the defendant in the cause in which it is made. He cannot traverse the truth of it by a plea in abatement or otherwise; but if it be false, the defendant's remedy is in an action against the constable for a false return." In Pennsylvania \* it was said in an early case: "It is a well-settled principle, applicable to every case, that credence is to be given to the sheriff's return; so much so that there can be no averment against it in the same action. A party can make an averment consistent with the sheriff's return, or explanatory of its legal bearing and effect, where the return is at large; but he cannot aver a matter directly at variance with the facts stated in the

<sup>1</sup> See Post, Ch. VII., Judgment of other States and Foreign Judgments, for authorities.

<sup>2</sup> *Cunningham v. Mitchell*, 4 Rand. 189; *Butts v. Francis*, 4 Conn. 424; *Watson v. Watson*, 6 Conn. 334; *Hutchins v. Johnson*, 12 Conn. 376; *Smith v. Law*, 5 Ired. L. 197; *Joyner v. Miller*, 55 Miss. 208; *Abell v. Simon*, 49 Md. 318; *Gary v. State*, 11 Tex. App. 527; *Dasher v. Dasher*, 47 Ga.

320; *Elder v. Cozart*, 59 Ga. 199; *Jones v. Commercial Bank*, 6 Miss. 43; *Tidwell v. Witherspoon*, 18 Fla. 282.

<sup>3</sup> *Green v. Kindy*, 43 Mich. 279.

<sup>4</sup> *Anonymous*, Lofft, 371; *Bentley v. Hone*, 1 Lev. 86; *Flud v. Pennington*, Cro. Eliz. 872; *Rex v. Elkins*, 4 Burr. 2129; *Harrington v. Taylor*, 15 East, 378; *Goubot v. De Crouy*, 2 Dowl. P. C. 86.

<sup>5</sup> *Allen v. Martin*, 10 Wend. 300; *Boomer v. Laine*, 10 Wend. 525.

return, and contradictory to it, and showing it to be false. If a party be injured by the false return of the sheriff, the remedy is by action on the case against the sheriff who makes it." It has also been distinctly and strongly affirmed in Massachusetts cases.<sup>3</sup> In New Hampshire it is said: "As between the parties, the return of the sheriff is conclusive upon all matters material to be returned, and cannot be contradicted by such parties or their privies, or by bail, indorsers or others, whose rights or liabilities are dependent upon the suit. The remedy for false return is by suit against the sheriff, and not by defeating the proceedings in which such return is made." To the same purport are the Kentucky cases.<sup>4</sup> In Vermont and Maine the cases in Massachusetts have been followed.<sup>5</sup> In Indiana, the Court say: "It must be regarded as well settled in this State, that the truth of a sheriff's return, showing the service of process, can not be disputed by the party, even upon a direct application before default to have the return set aside or corrected, and much less, in reason, after the rendition of judgment, and by way of collateral attack,"<sup>6</sup> and so are the decisions in North Carolina, Arkansas, Minnesota and Nebraska.<sup>7</sup> In Illinois the English rule has been recognized,<sup>8</sup> though it is said some

<sup>3</sup> Knowles v. Lord, 4 Whart. 500; Zion's Church v. St. Peter's Church, 5 W. & S. 215; Diller v. Roberts, 13 S. & R. 60; Paxson's Appeal, 49 Pa. St. 195.

<sup>3</sup> Slayton v. Chester, 4 Mass. 478; Bott v. Bunnells, 11 Mass. 163; Winchell v. Stiles, 15 Mass. 230; Bean v. Parker, 17 Mass. 591; Campbell v. Webster, 15 Gray, 28; Dooley v. Wolcott, 4 Allen 406.

<sup>3</sup> Bolles v. Bowen, 45 N. H. 124; Brown v. Davis, 9 N. H. 76; Wendell v. Mugridge, 19 N. H. 112; Angier v. Ash, 26 N. H. 99; Messer v. Bailey, 31 N. H. 9; Clough v. Monroe, 34 N. H. 381.

<sup>4</sup> Trigg v. Lewis' Ex'rs, 3 Litt. 129; Smith v. Hornback, 3 A. K. Marsh. 392.

<sup>5</sup> Eastman v. Curtis, 4 Vt. 616;

Swift v. Cobb, 10 Vt. 282; Wood v. Doane, 20 Vt. 612; Stratton v. Lyons, 53 Vt. 130; Gilson v. Parkhurst, 53 Vt. 384; Stinson v. Snow, 10 Me. 203; Fairfield v. Paine, 23 Me. 496.

<sup>6</sup> Krug v. Davis, 85 Ind. 309; Rowell v. Klein, 44 Ind. 290; Splahn v. Gillespie, 48 Ind. 397; Johnson v. Patterson, 59 Ind. 287; Stockton v. Stockton, 59 Ind. 574; Hite v. Fisher, 76 Ind. 231; Cuvagnah v. Smith, 84 Ind. 380; Clark v. Shaw, 79 Ind. 164; Freeman v. Apple, 99 Pa. St. 261; Love v. Smith, 4 Verg. 117; McBea v. State, Meigs, 122; Baxter v. Erwin, Thomp. Tenn. Cas. 175; State v. O'Neill, 4 Mo. App. 221.

<sup>7</sup> Hunter v. Kirk, 4 Hawks, 277; Rosa v. Ford, 2 Ark. 26; Tullis v. Brawley, 3 Minn. 277; Johnson v. Jones, 2 Neb. 126.

<sup>8</sup> Fitzgerald v. Kimball, 86 Ill. 316.

exceptions are made to it in furtherance of justice in that State.<sup>1</sup> What the exceptions are is not pointed out in that case; but in a subsequent case,<sup>2</sup> we have the following statement as the result of prior decisions: "It is in rare cases only that a return of the officer can be contradicted, except in a direct proceeding by suit against the officer for a false return. In all other cases, almost without an exception, the return is held to be conclusive. An exception to the rule is, where some other portion of the record in the same case contradicts the return; but it cannot be done by evidence *dehors* the record." And this is the doctrine announced by elementary writers,<sup>3</sup> and in the additional cases cited.<sup>4</sup> Nor will the sheriff be allowed to contradict it after judgment has been rendered on it,<sup>5</sup> and this is the rule in regard to the returns of United States Marshals.<sup>6</sup>

<sup>1</sup> Ryan v. Lander, 89 Ill. 554.

<sup>2</sup> Hunter v. Stoneburner, 92 Ill. 75.

<sup>3</sup> Sewell on Sheriffs, 387; Atkinson on Sheriffs, 248; Allen Sheriffs, 58; Gwynne Sheriffs, 473; Viner Ab. Ret. 23; 2 Dane Abridg. 645; Loft. 372.

<sup>4</sup> Bar v. Satchwell, 2 Stra. 813; Bates v. Willard, 10 Met. 80; Buckmaster v. Applebee, 8 N. H. 546; Sias v. Badger, 6 N. H. 393; Evans v. Parker, 20 Wend. 622; Stewart v. Stinger, 41 Mo. 400; Rivard v. Gardinier, 39 Ill. 125; Putnam v. Main, 3 Wend. 202; Bank v. Doningem, 12 Ohio. 220; Egery v. Buchanan, 5 Cal. 53; Mentz v. Hamman, 5 Whart. 150; Munroe v. Merrill, 6 Gray, 237; Wilson v. Loring, 7 Mass. 388; Bull v. Clark, 2 Met. 589; Stevens v. Bigelow, 12 Mass. 434; Reeves v. Reeves, 33 Miss. 28; Castner v. Styer, 23 N. J. L. 236; Eastabrook v. Hapgood, 10 Mass. 313; Lawrence v. Pond, 17 Mass. 433; Smith v. Emerson, 43 Pa. St. 456; Folsom v. Carli, 5 Minn. 333; McDonald v. Leewright, 31 Miss. 29; State v. Clerk, 25 N. J. L. 209; Carr v. Bank, 16 Wis. 50; Boone v.

Lowry, 9 Mo. 24; Lathrop v. Blake, 23 N. H. 46; Dickinson v. Lowell, 35 N. H. 9; Smart v. Batchelder, 57 N. H. 140; Hallowell v. Paige, 24 Miss. 590; Phillips v. Elwell, 14 Ohio S. 240; Castner v. Simonds, 1 Minn. 427; Eastman v. Bennett, 6 Wis. 232; Paxton v. Steckel, 2 Pa. 93; Sutton v. Allison, 2 Jones L. 339; Shotwell v. Hamblin, 23 Miss. 156; Gardner v. Hosmer, 6 Mass. 325; Weld v. Bartlett, 10 Mass. 470; McGough v. Wellington, 6 Allen, 505; Kuhlman v. Orser, 5 Duer, 242; Miller v. Moses, 56 Me. 129; Whitaker v. Sumner, 7 Pick. 551; Hamilton v. Matlocks, 5 Blackfd. 421; Remington v. Henry, 6 Blackfd. 63; Smith v. Noc, 30 Ind. 117; Storrs v. Kelsey, 2 Paige, 418; Cozine v. Walter, 55 N. Y. 304; Hill v. Grant, 49 Pa. St. 200; McArthur v. Pease, 41 Mo. 400; Boyd v. Murray, Phil. (N. C.) Eq. 238; Wilson v. Gannon, 54 Me. 384; Edwards v. Tipton, 77 N. C. 223; Dunham v. Wilfong, 69 Mo. 355.

<sup>5</sup> Duncan v. Gerdine, 59 Miss. 550.

<sup>6</sup> Miller v. U. S., 11 Wall. 268; Brown v. Kennedy, 15 Wall. 591.

§ 453. It is the policy of the law to uphold execution sales, were it otherwise, parties could not be induced to purchase. And if, after confirmation, and the issuing of the deed, a party should be liable to have property, purchased in good faith, taken from him for the neglect or omission of the officer making the sale, there would be no security in titles; therefore, courts have wisely decided that such irregularities as may have been good cause for setting aside a sale before its confirmation, or before the rights of third parties have become vested, will not be allowed to vitiate a sale or deprive a party of his rights. If a purchaser's title were to depend upon such questions as the selection of appraisers, or publication for a specified time, and courts were to permit evidence to be introduced, *aliunde*, to show irregularities of this kind, in contradiction of an officer's return on an execution, a purchaser would be at the constant risk of having his title defeated by parol evidence; therefore, a return of the proceedings of an officer under an execution, as between the parties to the action and their privies, is conclusive, and cannot be traversed; nor can it be collaterally impeached, even if the officer is shown to have been guilty of fraud and collusion. This rule is necessary to secure the rights of parties, and give validity and effect to the acts of ministerial officers, and giving parties injured by such return redress only in actions against the officer for false return.<sup>1</sup> Nor can an officer be made to contradict

<sup>1</sup> Rowell v. Klein, 44 Ind. 290; Hamilton v. Matlocks, 5 Blackf. 421; Remington v. Henry, 6 Ind. 63; Smith v. Noe, 30 Ind. 117; Storrs v. Kelsey, 2 Paige, 418; Cozine v. Walter, 55 N. Y. 304; Egery v. Buchanan, 5 Cal. 56; Campbell v. Webster, 15 Gray, 28; Phillips v. Elwell, 14 Ohio S. 240; Carr v. Commercial Bank, 16 Wis. 30; Bolles v. Bowen, 45 N. H. 124; Paxson's Appeal, 49 Pa. St. 195; Hill v. Grant, 49 Pa. St. 200; McArthur v. Pease, 46 Barb. 423; Ayers v. Duprey, 27 Tex. 593; Stewart v. Stringer, 41 Mo. 400; Rivard v. Gardiner, 39 Ill. 125; Rice v. Groff, 58 Pa. St. 116; Boyd v. Murray, Phil. N. C. Eq. 238;

Susquehanna, &c. Co. v. Finney, 58 Pa. St. 200; Allen v. Martin, 10 Wend. 300; Boomer v. Lane, 10 Wend. 525; Stimpson v. Snow, 10 Me. 263; Hill v. Kling, 6 Ohio, 135; Case v. Redfield, 7 Wend. 398; Ins. Co. v. Force, 8 How. 353; Barrett v. Copeland, 18 Vt. 67; Conner v. Silver, 26 Tex. 606; Smith v. Hornback, 3 A. K. Marsh. 392; Dooley v. Woolcott, 4 Allen, 606; Wilson v. Hurst, 1 Pet. C. C. 441; Diller v. Roberts, 13 S. & R. 60; Bott v. Burnell, 11 Mass. 163; Whitaker v. Sumner, 7 Pick. 551; Lawrence v. Pond, 17 Mass. 433; Reeves v. Reeves, 33 Mo. 28; Tullis v. Brawley, 3 Minn. 277; Hotchkiss v. Hunt,

it.<sup>1</sup> He is bound by it, and cannot impeach it, being intrusted by law with the performance of a duty of which a record has been

- 56 Me. 352; *Stiles v. Knapp*, 2 G. 1. 36; *Polley v. Lenox*, 1 Allen, 329; *Folsom v. Carll*, 5 Minn. 333; *McDonald v. Leewright*, 31 Mo. 29; *Rhorer v. Terrill*, 4 Minn. 407; *McGough v. Wellington*, 6 Allen, 505; *Morford v. Thomas*, 1 Ky. (Dec.) 251; *Rollins v. Mooers*, 35 Me. 192; *Haynes v. Wheat*, 9 Ala. 239; *McBee v. State*, 1 Meigs. 122; *Sawyer v. Curtis*, 2 Ash. 127; *Mentz v. Hanman*, 5 Whart. 150; *Sample v. Coulson*, 9 W. & S. 62; *Brown v. Davis*, 9 N. H. 76; *Zion Church v. St. Peter's Church*, 5 W. & S. 215; *Burr v. Moody*, *Wright (O.)* 449; *Burger v. Beckett*, 6 Blackf. 61; *Houser v. Hampton*, 7 Ired. 333; *Daniel v. Justices*, *Dudley (Ga.)* 2; *Wood v. Doane*, 20 Vt. 612; *Ringold v. Edwards*, 7 Ark. 86; *Doe v. Ingersoll*, 19 Miss. 249; *Humphries v. Lawson*, 7 Ark. 311; *Palmer v. Clarke*, 2 Dev. 354; *Dodge v. Farnsworth*, 19 Me. 278; *Lothrop v. Abbott*, 10 Me. 421; *Holmes v. Baldwin*, 17 Me. 391; *Chase v. Hazelton*, 7 N. H. 171; *Tyler v. Smith*, 8 Met. 599; *Flick v. Troxell*, 7 W. & S. 65; *Kicksey v. Bates*, 1 Ala. 303; *Shonenberger v. Lemerck*, 23 Kan. 55; *Hoffman v. Dauner*, 14 Pa. St. 25; *Grover v. Howard*, 31 Me. 516; *Shortwell v. Hamblin*, 23 Miss. 151; *Muttin v. Barney*, 20 Ala. 369; *Slayton v. Chester*, 4 Mass. 478; *Esterbrook v. Hapgood*, 10 Mass. 313; *Dean v. Parker*, 17 Mass. 391; *Hawks v. Baldwin*, *Brayt*, 85; *Boston v. Gileston*, 11 Mass. 468; *Lewis v. Blair*, 1 N. H. 68; *Williams v. Lownds*, 1 Hall, 579; *Trigg v. Lewis*, 3 Litt. 129; *Shottenkirk v. Wheeler*, 2 Johns. C. R. 275; *Albany City Bank v. Dorr*, *Walker Ch.* 317; *Goubot v. DeCrouy*, 1 C. & M. 772; *Stevens v. Brown*, 3 Vt. 420; *Bamford v. Melville*, 17 Me. 14; *Small v. He Jan*, 1 Litt. 16; *Slade v. Inhabitors*, 1 M. & S. 179; *Caldwells v. Harlan*, 3 Monr. 351; *Boydton v. Willard*, 10 Pick. 169; *Whiting v. Bradley*, 2 N. H. 79; *Sergeant v. George*, 5 Litt. 198; *McConnell v. Bowdly*, 4 Monr. 392; *Tribble v. Flame*, 3 Monr. 51; *Alender v. Riston*, 2 G. & S. 86; *Putnam v. Man*, 3 Wend. 202; *Sis v. Bolger*, 6 N. H. 392; *Phillips v. Demoss*, 14 Ill. 410; *Caster v. Styer*, 23 N. J. L. 236; *Witherell v. Goss*, 26 Vt. 718; *Angier v. Ash*, 26 N. H. 99; *Newton v. State Bank*, 14 Ark. 9; *Penwick v. Fenwick*, 2 W. Black. 788; *Gardner v. Covey*, 1 Gale, 45; *Cahle v. Parkins*, 3 Stark. 193; *Anon. Loft*, 371; *Hunress v. Tiney*, 39 Me. 237; *Wendell v. Muiridge*, 19 N. H. 109; *Angell v. Bowler*, 3 R. I. 77; *Packard v. Wood*, 4 Gray, 307; *Crow v. Hudson*, 21 Ala. 569; *Bunker v. Gilmore*, 40 Me. 88; *Hallowell v. Page*, 24 Mo. 490; *Messer v. Baily*, 31 N. H. 9; *State v. Clerk, &c.*, 25 N. J. L. 209; *Knowlton v. Ray*, 4 Wis. 288; *Clough v. Moore*, 34 N. H. 381; *Ladd v. Wiggin*, 35 N. H. 421; *White River Bank v. Downer*, 29 Vt. 332; *Sellinger v. Higgins*, 26 Mo. 180; *Pratt v. Phillips*, 1 Sneed, 513; *Hinckley v. Buchanan*, 5 Cal. 53; *Zimmerman v. Mer. Nat. Bank*, 1 Mich. (N. P.) 14; *Grandy v. Macpherson*, 7 Jones L. 347; *Mueller v. Bates*, 2 Disney, 318; *Bowen v. Parkhurst*, 24 Ill. 257; *Pulson v. Haynes*, 11 Gray, 379; *Bank v. Eastman*, 44 N. H. 431; *Tilman v. Davis*, 28 Ga. 494; *Sindall v. Thacker*, 56 Ga. 51; *Davant v. Carleton*, 57 Ga. 489; *Dunham v. Wilfong*, 69 Mo. 355.

<sup>1</sup> *Washington, &c. Co. v. Kinnear*, 1 Wash. Ter. R. 116; *Duncan v. Gerdine*, 59 Miss. 550.

made, and it imports absolute verity.<sup>1</sup> If incorrect, he must obtain leave to amend.<sup>2</sup> It is conclusive evidence of the competency of the appraisers.<sup>3</sup> It is conclusive to show that the property belonged to the defendants,<sup>4</sup> and conclusive that he received the amount of the execution, but no evidence whatever that he has paid the money to the party entitled thereto.<sup>5</sup> Even though no money was received by him, as where he takes a note,<sup>6</sup> if he returns a levy made, it is conclusive that he has seized the property and taken it into his possession;<sup>7</sup> and his indorsement on the execution of the time of its reception, is conclusive that it was in his hands at that time.<sup>8</sup> And this, whether the return be made by himself or deputy,<sup>9</sup> for in law the officer and his deputy are one and the same. But they may prove facts

<sup>1</sup> *Micken v. Commonwealth*, 58 Pa. St. 203; *Mildmay v. Smith*, 2 W. Saund. 343; *Butler v. State*, 20 Ind. 169; *Vilas v. Reynolds*, 6 Wis. 214; *Planters' Bank v. Walker*, 11 Miss. 409; *Benjamin v. Hathaway*, 3 Conn. 528; *Cluley v. Lockhart*, 59 Pa. St. 376; *Shelden v. Payne*, 7 N. Y. 453; *Huntress v. Tiney*, 39 Me. 237; *Sutton v. Allison*, 2 Jones L. 339; *Heffner v. Reed*, 3 Grant, 245; *Hurlburt v. Mayo*, 1 Chitt. 300; *Cowan v. Wheeler*, 31 Me. 439; *Hustick v. Allen*, 1 N. J. L. 168; *Martin v. Barney*, 20 Ala. 369; *Blue v. Commonwealth*, 2 J. J. Marsh. 26; *Phelps v. Parke*, 4 Vt. 488; *Commonwealth v. Fuqua*, 3 Litt. 41; *Field v. Smith*, 2 M. & W. 388; *Foster v. Cookson*, 1 Q. B. 219; *Lawson v. Main*, 4 Ark. 184; *Haynes v. Small*, 23 Me. 14; *Wager v. Andrews*, 18 Me. 168; *Wells v. Bennetfield*, *Wright (O.)* 201; *Murrill v. Smith*, 3 Dana, 462; *Welsh v. Bell*, 33 Pa. St. 12; *Trigg v. Lewis*, 3 Litt. 129.

<sup>2</sup> *Henry v. Stone*, 2 Rand. 455.

<sup>3</sup> *Campbell v. Webster*, 15 Gray, 28; *Dooley v. Woolcott*, 4 Allen, 406.

<sup>4</sup> *Kicksey v. Bates*, 1 Ala. 303;

*Thornton v. Winter*, 9 Ala. 613.

<sup>5</sup> *Sheldon v. Payne*, 7 N. Y. 453; *Cater v. Stokes*, 1 M. & G. 599; *Barney v. Weeks*, 4 Vt. 146; *Sanborn v. Baker*, 1 Allen, 526; *First v. Miller*, 4 Bibb. 311; *Williams v. Cheesbrough*, 4 Conn. 356; *Hopkins v. Forsythe*, 14 Pa. St. 34; *Gardner v. Hosmer*, 6 Mass. 235; *Scott v. Seiler*, 5 Watts, 235; *Meredith v. Shewell*, 1 Pa. St. 496; *Shewell v. Fell*, 3 Yates, 14; *Armstrong v. Garrow*, 6 Cow. 465; *Denton v. Livingstone*, 9 Johns 98; *Townsend v. Olin*, 5 Wend. 207.

<sup>6</sup> *Eastman v. Bennett*, 16 Wis. 232; *Holt v. Robinson*, 21 Ala. 106; *Tiffany v. Johnson*, 27 Miss. 227; *Field v. Smith*, 5 Dowl. P. C. 735; *Sutton v. Allison*, 2 Jones L. 339; *Doty v. Turner*, 8 Johns. 20.

<sup>7</sup> *Welsh v. Bell*, 33 Pa. St. 12.

<sup>8</sup> *Williams v. Loundes*, 1 Hall, 579.

<sup>9</sup> *Sheldon v. Payne*, 7 N. Y. 453; *Townsend v. Olin*, 5 Wend. 207; *Paxton v. Stickel*, 2 Pa. St. 93; *Purington v. Loring*, 7 Mass. 392; *Doty v. Turner*, 8 Johns. 20; *Haynes v. Small*, 23 Me. 14; *Barrett v. Copeland*, 18 Vt. 69; *Gardner v. Hosmer*, 6 Mass. 327.

*dehors* their returns not inconsistent therewith.<sup>1</sup> he may, after seizure, show that the goods were not the debtors.<sup>2</sup>

§ 454. While an officer can not be permitted to contradict his own return, if he sells property for a sum specified in his return, and does not actually receive the money, but the execution creditor, who is himself the purchaser, receipts for the whole or part of his bid as money, the parties at the time regarding that as payment, the officer will be allowed to prove what the facts really were, in a contest between himself and the purchaser. Especially will this be the case where the return does not set forth a payment of money.<sup>3</sup>

A return by an officer that has sold the land taken in execution, and received a statutory bond, is conclusive of the fact of sale, the execution of the bond, and who were the purchasers and sureties, unless falsified by a judicial sentence in a proceeding in which the officer was a party.<sup>4</sup> The legal effect of a return may be inquired into.<sup>5</sup> A return of an authorized officer has the same force and effect as is given to the return of a known officer.<sup>6</sup>

§ 455. Courts are governed by the officer's return.<sup>7</sup> The return of the officer being a matter of record, and being, therefore, conclusive, no other court, in collateral actions, can inquire into the matters set forth therein. If the return is false, the officer is answerable for it to the proper party in a proper action, but its truth or falsity can not be inquired into in an action between other parties.<sup>8</sup> Nor is a stranger permitted to inquire into any defects in the return.<sup>9</sup>

<sup>1</sup> Evans v. Davis, 3 B. Monr. 344.

<sup>2</sup> Remmett v. Lawrence, 15 Q. B. 1004; Fuller v. Holden, 4 Mass. 498; Leonard v. Bryant, 13 Mass. 224; Tyler v. Ulmer, 12 Mass. 163; Whiting v. Bradley, 2 N. H. 83.

<sup>3</sup> Shotwell v. Hamblin, 23 Miss. 156; Langdon v. Summers, 10 Ohio St. 77.

<sup>4</sup> Tugg v. Lewis, 5 Litt. 129.

<sup>5</sup> Doe v. Ingersoll, 19 Miss. 249.

<sup>6</sup> Downer v. Buck, 25 Vt. 259.

<sup>7</sup> Wilson v. Gannon, 54 Me. 384.

<sup>8</sup> Stewart v. Stockton, 13 S. & R. 199; Armstrong v. Rickey, 2 B. R. 150; In re, Winn, 1 B. R. 131; Mueller v. Bates, 2 Disney, 318; Perrin v. Everett, 13 Mass. 125; Evans v. Parker, 26 Wend. 622; Story v. Kelly, 2 Paige, 418; Learned v. Andenburg, 7 How. Pr. 397.

<sup>9</sup> Terrill v. Anchauer, 14 Ohio St. 80; Rhonemus v. Corwin, 9 Ohio St. 366; Davis v. Campbell, 12 Ind. 192; Phillips v. Coffee, 17 Ill. 154; Moore v. Titman, 33 Ill. 359; Holborn v. Murphy,

§ 456. A party who is duly served under process, and against whom a judgment has been rendered for want of proper defense, cannot invoke the subsequent interposition of a court of equity to set aside a judgment, on the ground that he was not a resident of the state, and that by fraudulent misrepresentations he had been induced to come within the jurisdiction, so that process might be served on him. The objection should have been taken by appearing in the original suit, and moving to set aside the service of process, as procured by fraud.<sup>1</sup> Or the action should be dismissed even after a general appearance.<sup>2</sup> This principle is sound and salutary and there can be no question but what a court of justice would set such service aside. Yet the rule in other states is that when a party by some act or declaration out of the record, lulls his opponent into a false security, or by any other means deceives him, and thereby obtains a judgment or decree to his prejudice, the judgment or decree thus obtained is fraudulent and may be impeached upon that ground.<sup>3</sup>

While in Iowa it is held, that a judgment obtained by fraud in bringing the person of the defendant within the jurisdiction is invalid; and the defendant, having failed to appear in the original action, may plead the facts showing the fraud in a subsequent action on the judgment, commenced in the jurisdiction where he resides.<sup>4</sup>

The court say that it would be unjust to the defendant to seek a foreign jurisdiction for the purpose of asserting his rights, and that he is entitled to be protected in the State of his residence, and that such judgment will be absolutely void in such State, whatever effect it may have where rendered. While there is reason in this doctrine there is much more in the doctrine

20 Mo. 447; *McFee v. Harris*, 25 Pa. St. 103; *Swiggert v. Harper*, 5 Ill. 364; *Gunn v. Howell*, 35 Ala. 144.

<sup>1</sup> *Peel v. January*, 35 Ark. 331; S. C., 37 Am. R. 27; *Blair v. Tuttle*, 1 McCrary, 372; *Marsh v. Bast*, 41 Mo. 493; *Fleming v. Nunn*, 61 Miss. 603; *Grindle v. Ruby*, 14 Ill. App. 439; *Nav. Co. v. Gates*, 10 Oreg. 514; *Hose v. Allwein*, 91 Ind. 497; *Ins. Co.*

*v. Ins. Co.*, 97 Pa. St. 15; *Allison v. Chapman*, 19 F. R. 488; *Jackson v. Patrick*, 10 S. C. 19; *Bull v. Rowe*, 13 S. C. 355; *Oragin v. Lovell*, 109 U. S. 149.

<sup>2</sup> *Townsend v. Smith*, 47 Wis. 623; *Nichols v. Goodheart*, 5 Ill. App. 574.

<sup>3</sup> *Ellis v. Kelly*, 8 Bush, 621.

<sup>4</sup> *Dunlap v. Cody*, 31 Ia. 260; *Cowin v. Toole*, 31 Ia. 516; *Whelstone v. Whelstone*, 31 Iowa, 276.

that the defendant should plead the fraud as a defense in the original action, for the reason, that unless such fraud is made to appear, no court in the civilized world could, of its own knowledge, know whether any fraud has been perpetrated where the record shows personal service on the defendant. Then it may be an afterthought of the defendants in the State where such judgment is sought to be enforced to set up this plea. If a party can defeat a recovery by a valid defense and does not, he should suffer the consequences of his own neglect, and the laches of such party should, upon principle, be held to a perfectly consciable bar or estoppel against such attacks upon judgments. If the party is lured into another jurisdiction and there sued, is not a court without notice of such fraud lured into the rendition of a judgment against him?

The doctrine that he who has a valid defense to an action but fails to make it, is concluded by the judgment, can be no more appropriately applied than in a case of this kind. If a party can successfully defeat an action on such a judgment, he can certainly prevent the original judgment from being rendered and thus prevent a court from being imposed upon. It is upon this ground that we think the doctrine first stated is correct. If the Iowa rule is correct and a defendant is allowed to evade a judgment by impeaching it for fraud, when such fraud is a good ground for a motion to quash, or suspend the proceedings, it is offering a direct premium for negligence and delaying to resort to the mode pointed out by law for correcting such matters, and virtually establishes a reward to a party who waives his rights by confessing, or allowing judgment to be taken against him as confessed. If this principle is sound then it is more advantageous to allow a judgment to be taken by default than to contest the matter and set up every available defense.<sup>1</sup>

§ 457. Except in special cases the plea of *res adjudicata* applies, not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought forward at the time. It applies to every

<sup>1</sup> Post, ch. VII.

objection urged in a second suit, when the objection was open to the party within the legitimate scope of the pleadings of the former one and might have been presented in it.<sup>1</sup> Thus a judgment in favor of a bondholder upon certain municipal bonds, part of a large issue, against the town issuing them, is conclusive on a question of the validity of the issue on a suit brought by the same creditor against the same town on other bonds; another part of the same issue, the parties being identical, and all the objections taken by the town in the second having been open to be taken by it in the former one.<sup>2</sup> Where the parties and the cause of action are the same, the *prima facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue. The rule in such a case being, that where every objection urged in the second suit was open to the party, within the legitimate scope of the pleadings, in the first suit and might have been presented in that trial, the matter must be considered as having passed *in rem judicatum*, and the former judgment in such a case is conclusive between the parties.<sup>3</sup> In a late case it was held that where bonds were void as against the county, in the hands of parties who did not acquire them for value before maturity, a judgment on the interest coupons against the plaintiff, where he omitted to prove that he acquired them for value before maturity, did not estop him in a subsequent action on other bonds and coupons of the same issue as those in the original action, from showing that he acquired such other bonds and coupons before maturity, and thus recovering a judgment against

<sup>1</sup> Roberts v. Heine, 27 Ala. 678; Gould v. R. R. &c., 91 U. S. 179; Tredway v. McDonald, 51 Iowa, 663; Brooks v. O'Hara, 8 F. R. 529; U. S. v. Throckmorton, 98 U. S. 65; Price v. Dewey, 6 Sawyer, 493; Thompson v. Myrick, 24 Minn. 4; Noyes v. Kern, 94 Ill. 521; Sheets v. Selden, 7 Wall. 416; Henderson v. Henderson, 3 Hare, 115; Baggot v. Williams, 3 B. & C. 241; Stafford v. Clark, 3 Bing. 382; Miller v. Covert, 1 Wend. 487; Babcock v. Camp, 11 Ohio St.

11; Aurora v. West, 7 Wall. 82.

<sup>2</sup> Beloit v. Morgan, 7 Wall. 619; Whittaker v. Johnson, 11 Iowa, 595; Mayor v. Lord, 9 Wall. 414; San Antonio v. Lane, 32 Tex. 411; R. R. v. R. R., 20 Wall. 143; Pieble v. Supervisors, 8 Biss. 358; Doolittle v. Don Maus, 34 Ill. 457; Lumber Co. v. Bechtel, 101 U. S. 638.

<sup>3</sup> Greathead v. Bromley, 7 T. R. 452; Outram v. Morewood, 3 East, 358; Gould v. Evansville, &c. Co., 91 U. S. 526.

the county.<sup>1</sup> So where under a clause of re-entry for non-payment of rent reserved, a landlord sues in ejectment, in a State in which the judgment has the same conclusiveness, as common law judgments in other cases, for a recovery of his estate a verdict is found for him; and judgment given accordingly, the tenant cannot in another proceeding, deny the validity of the lease, nor his possession, nor his obligation to pay the rents reserved, nor that the installment of rent demanded was due and unpaid.<sup>2</sup> So where a judgment has been rendered against a principal and his security in a bond, and the security sues the principal, after satisfying the judgment, for money paid to his use, the principal is estopped from alleging illegality or want of consideration in the bond. The bond being merged in the judgment the proper place to make that defense was on the former suit.<sup>3</sup> So where the parties to an equity case and two ejectment suits agreed that the court should frame an issue to supersede and take the place of the ejectment suits, the determination of the issue to decide the facts raised by the bill in equity, as to the title of certain leaseholds, and the costs of the suit in equity to follow the verdict on the issues. The submission is binding on the parties, and the verdict was conclusive.<sup>4</sup> So where the parties, by stipulation, submitted their action to the court in vacation, agreeing that judgment might be rendered *nunc pro tunc*, a hearing was had and judgment rendered accordingly. It was held final, subject only to appeal.<sup>5</sup> So where in a former action the plaintiff demanded that the title to certain lands be quieted in him, or, if the defendant should be found to have the better title, that plaintiff should be reimbursed by defendant for taxes paid by plaintiff on the land, and (by agreement of parties, these propositions were specially submitted to the court) the court entered a decree dismissing plaintiff's bill as to the *lands*; held a dismissal and adjudication

<sup>1</sup> *Cromwell v. County of Sac*, 94 U. S. 351; *Davis v. Brown*, 94 U. S. 423; *Russell v. Place*, 94 U. S. 606; *Cambell v. Rankin*, 99 U. S. 261; *Smith v. Ontario*, 4 F. R. 386.

<sup>2</sup> *Morris v. Howell*, 35 Mo. 467; *Heichen v. Hamilton*, 9 Greene, (Ia.) 317; *Sheets v. Selden*, 7 Wall. 416;

*Love v. Waltz*, 7 Cal. 250; *Tysen v. Tompkins*, 10 Daly, 244.

<sup>3</sup> *Pitts v. Fugate's Adm'rs*, 41 Mo. 405; *Arnold v. Kyle*, 8 Baxt. 319; *Bank v. Flesman*, 22 W. Va. 317.

<sup>4</sup> *Long's Appeal*, 92 Pa. St. 171.

<sup>5</sup> *Pease v. Roberts*, 9 Ill. App. 132.

of both claims made by the plaintiff.<sup>1</sup> So where, in an action against a railroad company the parties agree to submit the case to a jury to find the full amount of the damages past, present and future, and agreed that no future actions should be brought after the rendition of the verdict and judgment, the judgment is a bar to any future action brought by the party making the agreement; for in a case of this kind, whatever injuries were proven, were of the character the parties had in view when they stipulated that no further action should be brought.<sup>2</sup> So a judgment recovered in an action, wherein the plaintiff claimed damages generally, for the building of an embankment and diverting the water from his land, bars all future actions for damages for such diversion, although the jury were instructed not to take into account any permanent injury to the land, as the plaintiff might institute other suits for damages sustained subsequent to the commencement of that action.<sup>3</sup> So where an action is brought against a city for its neglect to do a public duty imposed upon it by law, the declaration going upon its neglect to do the thing at all; a judgment that it was not bound to do the thing at all, may be used as an estoppel in another suit, where the allegation is, that being bound, it entered upon its duty, but never finished the work, by which neglect to finish, the injury occurred.<sup>4</sup>

§ 458. A judgment to be effectual and binding, as an estoppel, must show that the subject matter has been passed on and adjudicated, and binds parties and privies, and it must be based on the jurisdiction of the person or of the subject matter. If either are wanting, the whole proceedings are *coram non judice*, and may be questioned in either a direct or collateral proceeding; the decree in such a case being void, all acts under it are void, and all rights flowing from it are of the same character.<sup>5</sup> But when jurisdiction is shown, it is conclusive, not only as to matters actually determined, but as to every other thing then within the

<sup>1</sup> Goodenow v. Litchfield, 59 Iowa, 226.

<sup>2</sup> Stodghill v. R. R., 53 Iowa, 341.

<sup>4</sup> Goodrich v. Chicago, 5 Wall.

<sup>3</sup> R. R. v. Allen, 39 Ill. 205; Henry v. Archer, 1 Bail. Ch. 535.

566.  
<sup>5</sup> Campbell v. McCahan, 41 Ill. 45

knowledge of the complainant in the suit which might have been set up as a ground for relief, and litigated in the first suit.<sup>1</sup>

§ 459. A question that is pending in one court of competent jurisdiction cannot be raised and agitated in another, by alleging and raising a new question with the old one as to the former party. The old one is in the hands of the court first possessed of it, and is to be decided by such court;<sup>2</sup> and where a matter is directly in issue and adjudged in a court of common law, that judgment may be set up as an estoppel in a court of admiralty.<sup>3</sup> (The doctrine of conclusiveness of judgments is that they are conclusive between the same parties in a subsequent proceeding upon the same matter; and not only as to matters actually determined, but as to every other thing then within the knowledge of the complainant in the suit, which might have then been set up as a ground for relief and litigated in the first suit;<sup>4</sup> and this seems to be the only method of putting in practice the fundamental principle of *Interest rei publice ut sit finis litium*.) This is the general rule, and it seems to be supported by the weight of authorities. The old rule, that a judgment is conclusive only as to the matters directly in issue in the former suit has been enlarged

§ 460. In a leading case<sup>5</sup> Chief Justice Parker, citing many authorities, in delivering the opinion of the court in regard to

<sup>1</sup> Hamilton v. Quimby, 46 Ill. 90; Danaher v. Prentiss, 22 Wis. 311; Scully v. Lowenstein, 56 Miss. 652; Hemenway v. Wood, 53 Iowa, 21; Hamner v. Griffith, 1 Grants Cas. 193; Foster v. Evans, 51 Mo. 39; Thompson v. McKay, 41 Cal. 221; Woodin v. Clemence, 32 Iowa, 280; Jordan v. Van Epps, 55 N. Y. 427; Bloodgood v. Gracey, 31 Ala. 575; Ruegger v. R. R., 103 Ill. 419; Davis v. Mayor, 93 N. Y. 250; Montgomery v. Harrington, 58 Cal. 279; Preble v. Supervisors, 8 Biss. 378; Buck v. Collins, 69 Me. 445; Tredway v. McDonald, 51 Iowa, 663; Devegrev. Devegrev. 33 La. Ann. 689; Lewis v.

Boston, 130 Mass. 339; Randolph v. Little, 62 Ala. 396; McWilliams v. Morrell, 23 Hun, 162; R. R. Co. v. Schutte, 103 U. S. 118; Thompson v. Blanchard, 2 Lea, 528; Barrett v. Failing, 8 Oreg. 152; Thompson v. Myrick, 24 Minn. 1.

<sup>2</sup> Memphis v. Dean, 8 Wall. 61.

<sup>3</sup> Goodrich v. City, 6 Wall. 599.

<sup>4</sup> Hamilton v. Quimby, 46 Ill. 90; Danaher v. Prentiss, 22 Wis. 311; Johnson v. Johnson, 70 Ill. 215; Adams v. Schnitz, 17 Wis. 169; Rodgers v. Higgins, 57 Ill. 211; Ruger v. R. R. Co., 103 Ill. 419; Davis v. Mayor, 93 N. Y. 250.

<sup>5</sup> King v. Chase, 15 N. H. 13.

the question of what is the matter in issue, said: "A verdict and judgment between rival parties may be offered in evidence by way of admission, or to establish a collateral fact. In those cases it is only a way of proof of the fact tried or found. And if that matter does not appear, by reason of the generality of the proposition, it may be made certain by evidence *abundant*." When that offered it is usually conclusive evidence of the fact established by it, and no more.<sup>1</sup> A verdict and judgment may be used as evidence between the same parties and their privies, as a bar, or a foundation for the same cause. The matter may be proved, if there be an opportunity to plead it. When thus pleaded it is conclusive.

"A verdict and judgment is opportunity to plead the judgment in fact, but not by way of evidence, and is equally conclusive of the matter in question established by it."

"There is a case which held that it may be evidence between the parties, not offered as a bar, but not conclusive evidence."<sup>2</sup> But this cannot be supported upon principle. The operation of such a case would be to authorize the introduction of the verdict of one jury as evidence, not to show that the matter in question had been tried and settled, but to influence the minds of a jury having a similar question before them, to find the fact in the same way that the former jury found it—upon the faith that the first jury were capable, and duly investigated the subject upon competent proofs, and therefore, probably found the fact correctly. It is quite evident that the weight to be given to it in that view is entirely uncertain. In order to understand its true value, and the weight which ought to be given to it in establishing the matter in question and upon trial, that it may appear how exactly the proofs and arguments were laid before them, the proofs themselves, and the arguments used on the former trial, should also be shown; for otherwise the second jury could not know whether the case was fully considered. And to all these there should be added a statement of the grounds upon which the former jury proceeded in making up their verdict.

"It is only upon evidence of this character that the jury to

<sup>1</sup> Parker's Admr. v. Thompson, 3 Pick. R. 429.

<sup>2</sup> 1 Stark. Ev. 183-187.

<sup>3</sup> Dame v. Wingate, 12 N. H. 291.

<sup>4</sup> Kinnersley v. Orpe, 2 Doug. 517.

whose consideration the verdict and judgment are offered as a matter of evidence which should have some influence in determining the disputed fact, can have any reasonable idea how much weight they ought to attach to it. But this evidence they cannot have.

§ 461. "If a verdict and judgment are admitted as evidence of any matter tried and found, they furnish evidence that it has passed *in rem judicatum*. If so, that is a mere matter to influence a jury, or not, according as opinion, whim, or caprice, or even as a sound judgment respecting the competency of the former jury to judge, may dictate. "As a mere fact, it has no bearing upon the merits of the case, in connection with other evidence of facts, to show the truth of the matter previously found; because it is not a fact which occurred in connection with such other facts, but it is of itself a conclusion, or results from the consideration, or trial, or admission, of such other facts, or some of them.

"As evidence to show that the matter in controversy between the parties has been considered, settled and passed into judgment it is conclusive.

"And here again, if, from the general nature of the pleadings, the matter which has been tried does not appear upon the face of the record, it may be shown by other evidence.

"But the judgment is thus conclusive only upon the matter which was directly in issue upon the former trial; and the question arises, what is to be understood by the 'matter in issue?' The difficulty lies in its application, in determining what is meant by a judgment directly upon the point."

"Any fact attempted to be established by evidence, and controverted by the adverse party, may be said to be in issue, in one sense. As, for instance, in an action for trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact

<sup>1</sup> 1 Stark. Ev. 190; *Hitchin v. Campbell*, 2 Wm. Black. 827; *Matlett v. Foxcroft*, 1 Story's C. C. R. 474; *Wadleigh v. Veazie*, 3 Sumner's R. 165; *Vogel v. Breed*, 14 Ill. App. 538; *Henry v. Davis*, 13 W. Va. 230; Car-

roll v. Hamilton, 30 La. An. 520; *Lodoux v. Burton*, 30 La. An. 576; *Barkdue v. Hemig*, 30 La. An. 618; *Logan v. Herbert*, 30 La. An. 727; *R. R. Co. v. Schutte*, 103 U. S. 118; *Richard v. Jones*, 16 Mo. 177.

is a matter in issue between the parties. This may be tried, and may be the only matter put in controversy by the evidence of the parties.

"But this is not the matter in issue within the meaning of the rule.

"It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue.

"The declarations and pleadings may show specifically what this is, or they may not. If they do not, the party may adduce other evidence to show what was in issue, and thereby *make the pleadings as if they were specific*.

§ 402. "But facts offered in evidence to establish the matters in issue are not themselves in issue within the meaning of the rule, although they may be controverted on the trial. Deeds which are merely offered in evidence are not in issue, even if their authenticity be denied.

"When a deed is merely offered as evidence to show a title, whether in a real or personal action, there is no *non est factum* involved in the matters put in issue by the plea of *not disseizin* or *not guilty*, which makes the execution of that deed a matter in issue in the case, notwithstanding the jury may be required to pass upon the fact of its execution. The verdict and judgment do not establish that fact one way or the other, so that the finding is evidence. The title is in issue. The deed comes in controversy directly, in one sense; that is, in the course taken by the evidence, it is direct and essential. But in another sense it is incidental and collateral. It is not a matter necessary, of itself, to the finding of the issue. It may be made so by the parties.

"This may be illustrated by the case before us. Laying out of consideration the question whether this is a case between the same parties, the former action was for taking certain oats. The matter in issue was the title to the oats, and the conversion by the defendant in that case. Upon that the jury passed. They found that the plaintiff had no title, or that the defendant did not convert them, which may be involved in the first.

"It may be shown by parol evidence, if necessary, upon which ground the verdict proceeded, and it appears in this case

that they found the plaintiff had no title. The conversion by the defendant in that case was not denied if the plaintiff had title.

"That matter, then, is settled. The verdict and judgment may be given in evidence in another action for the oats between those parties, and is conclusive. But that is the extent of what was in issue.

"It appears that the title set up in that case was by a mortgage. In finding that the plaintiff had no title, the jury must have been of opinion that the mortgage was fraudulent. It is contended that this was in issue, and the only matter in issue.

"But this was only a controversy about a particular matter of evidence upon which the plaintiff then relied to show title. If that was the only matter in issue, the plaintiff might bring another suit for those oats, against the same defendant, and, relying upon some other title than that mortgage, try the title to the oats over again. Can he do so? Clearly not; and the reason is, that it is his title which has been tried, and he is concluded.

"The title, however, which has been tried, was only his title to the oats.

"The question whether the mortgage was fraudulent came up only incidentally, by reason of his relying on that as his title. But the mortgage was not the matter in issue.<sup>1</sup>

"And while the finding is conclusive on the question of his title to the oats, it is neither conclusive nor evidence upon anything else, because nothing else was in issue.

§ 463. "It appears from this that it is important to apply the rule to what was in issue in the action, and not to what was merely incidentally in controversy in the evidence."

"It is important for the security of both parties. In this case there might be no great mischief, if the rule was held to apply to the matter in evidence, instead of that in issue. The controversy in the former case seems to have been simple. If the parties were the same the plaintiff might not complain of injustice, if it were held that he is concluded by the finding of the former jury; having once admitted the controversy raised

<sup>1</sup> Town v. Nims, 5 N. H. 225.

by the evidence, whether the mortgage was fraudulent to a jury, and the verdict having shown that they must have so found it. But the principle applicable here must be applied in other cases, where the matters in evidence are more complicated, and where it would admit of more doubt how the jury regarded the evidence, and what facts they actually found.

"The rule then would have to be confined to what the jury must necessarily have found, which would still shut out as evidence, a great many matters actually tried, and as clearly found as anything in relation to this mortgage; or it must in many cases be left to the testimony of the jurors what facts they did find, which, when applied to all the controverted matters of evidence arising in a cause, might lead to great uncertainty and confusion.

"On the other hand, it would be great injustice to the defendant in the former action to hold that the matter in question was, whether the plaintiff's mortgage was fraudulent or not; that this was tried in that case and not his title generally, and that the plaintiff might commence another suit for the oats and set up another title, because no other title except the mortgage title had been tried.

"The title to the property now in question has not been tried. If the plaintiff has no title to it but the mortgage the defendant may show that the mortgage was fraudulent by the same evidence by which that matter was shown before.<sup>1</sup>

"There are cases which conflict to some extent with the principle we have thus stated; some of them holding that in order to make a record evidence to conclude any matter, it should appear from the record itself that the matter was in issue, and that evidence cannot be admitted to show that under such a record any particular matter came in question; while others maintain that a former judgment may be given in evidence, accompanied with such parol proof as is necessary to show the grounds upon which it proceeded, where such grounds, from the form of the issue, do not appear by the record itself; provided that the matters alleged to have been passed upon be

<sup>1</sup> *Jackson v. Wood*, 3 Wend. 27; *Wood v. Jackson*, in error, 8 Wend. 9.

such as might legitimately have been given in evidence under the issue joined, and such that, when proved to have been given in evidence, it is manifest by the verdict and judgment that they must have been directly and necessarily in question and passed upon by the jury.

§ 464. "We do not deem it essential that the record should of itself show that the matter was in issue, in order to make the determination of it conclusive.

"Upon the remaining point we are of opinion that there is sufficient privity between the sheriff and his deputy, here, to make the judgment in the suit against the deputy evidence, if it had been upon the same point now in issue. The sheriff is responsible for the acts of his deputy in attaching property. The plaintiff might have sued the defendant for the act of Stebbins in taking the oats. But he had the right also to sue Stebbins himself, and this he elected to do. Having litigated the title to the oats with him, and failed, he ought to be precluded from trying the same matter in another suit against the defendant, on the ground that the defendant is responsible and that he had a right of action against him also."

§ 465. It is necessary that strict attention be given so as not to confound matters which were not determined with those which were adjudicated. A fact is not the less collateral, because it forms a portion of the thread of the issue, unless it runs to the final determination of it, and is essential in sustaining the judgment. A recovery against A. and B. on a note indorsed by B. in the name of A. & Co., does not necessarily estop A. from denying the existence of such a firm, and that he is one of the members of it in a subsequent suit. For while this is what the note implies if made with the knowledge and consent of A. and is established by the judgment, still the evidence upon which the judgment was rendered may have shown that B. had a special and limited authority which did not extend to any other transaction. If therefore the uncertainty arising from the transaction is removed by evidence *abundant* that the only question in issue in the former suit was the question of partnership, and was in fact the only issue raised upon the former trial

by the parties, and that it was the only issue submitted to the court, and by the judgment as conclusive as it is in any other case, and that it is established by extrinsic evidence. Even an agreement between the parties that matters foreign to the pleadings shall be given in evidence and decided by the verdict of a jury, will not change the operation of a judgment entered on a verdict, or by way of estoppel.<sup>1</sup>

§ 403. The operation of a judgment as a merger of the cause of action, has often a more extensive effect than it has as an estoppel, and is conclusive upon all as extinguishing the original demand or cause of action in the new obligation or contract created by the judgment.<sup>2</sup> When final judgment is rendered by a court of competent jurisdiction in an action on a promissory note against the maker, such note becomes merged in the judgment, and no action can thereafter be maintained upon such note against the maker. And as no judgment can be maintained upon the note in the State in which the judgment was rendered, after

<sup>1</sup> *Good v. Warren*, 9 Exchq. 379, *Wells v. Washburn*, 6 Cow. 262.

<sup>2</sup> *Pitts v. Fugate*, 41 Mo. 405; *King v. Home*, 13 M. & W. 494, *Andrews v. Varnell*, 46 N. H. 17, *Bortolichis* App. 3, 77 Pa. St. 197; *Weyman v. Courme*, 35 Ill. 172, *Bank v. Bank*, 1 Cr. 415, *Burcy v. Gibbs*, 31 N. J. L. 327, *Bank v. Hart*, 5 Ohio S. 31, *Hickerson v. Shelton*, 37 Ala. 393, *Moschell v. Allen*, 25 Vt. 128; *Hertz v. Charlton*, 27 Pa. St. 290, *Napier v. Graham*, 30 Pa. St. 215; *Bangor v. Ingraham*, 33 Me. 372, *Hertz v. Sanborn*, 48 Me. 461, *Stoddifer v. Bush*, 15 Mo. 383, *Richardson v. Jones*, 11 Mo. 171, *Campbell v. Mayhew*, 15 B. Mon. 142, *Hoxox v. Fay*, 36 Barb. v. *McGillivray v. Avery*, 50 Vt. 548; *Cassan v. Holmes*, 18 Ind. 496, *Rawley v. Hoeker*, 21 Ind. 144, *Ault v. Zehring*, 38 Ind. 429, *Taylor v. Bryden*, 8 Johns. 173, *Andrews v. Montgomery*, 19 Johns. 162; *Boston, &c. Co. v. Hoyt*, 14 Vt. 92; *Clark v. Row-*

*ling*, 3 N. Y. 216; *Colt Estates*, 4 W. & S. 314, *Tinkum v. O'Neal*, 5 Nev. 93; *Robertson v. Smith*, 18 Johns. 459; *Ward v. Johnson*, 13 Mass. 148; *Wynn v. McNulty*, 7 Ill. 359, *Smith v. Black*, 9 S. & R. 112; *Gibbs v. Bryant*, 1 Pick. 118, *Lewis v. Williams*, 6 What. 264, *Anderson v. Loan*, 1 W. & S. 334, *Willings v. Consigny*, 1 Port. C. C. 209, *Cooksey v. R. R.*, 74 Me. 477, *Knapp v. Lee*, 42 Mich. 41; *Boynton v. Bell*, 165 Ill. 630, *H. Brock v. Foss*, 27 Me. 441; *Pike v. McDonald*, 32 Me. 418, *Sampson v. Clark*, 2 Cosh. 173, *Kellogg v. Schuyler*, 2 Den. 73, *Faxon v. Baxter*, 11 Cosh. 35, *Carrington v. Hallbird*, 17 Conn. 580, *Garrison, in re*, 2 Low. 74, *Fisher v. Foss*, 30 Me. 479, *Woodbury v. Perkins*, 5 Cosh. 80; *Wahott v. Hodge*, 15 Gray, 547; *Ellis v. Horn*, 28 Me. 385; *Uran v. Howdette*, 36 Me. 15; *Ewing v. Peck*, 17 Ala. 341; *Medbury v. Swan*, 46 N. Y. 203; *Monroe v. Upton*, 50 N. Y. 594.

its merger on action can be maintained in any other State, the judgment having the same conclusive effect in every State in the Union.<sup>1</sup> So, where a plaintiff had judgment on two notes, and the clerk, in making up judgment, accidentally omitted one of them; plaintiff then surreptitiously withdrew it from court, and assigned it to a third party, who sued upon it; defendant set up the judgment, and it was held a good bar.<sup>2</sup> Thus, where a party brings suit on a note, secured by a vendor's lien, and judgment by default is rendered for the amount of the note without any reference to the land, and the plaintiff exhausts his remedies by execution and supplementary proceedings, he can not then obtain a decree enforcing his lien; if he does it is *ex parte non judicis*; the first judgment terminates the action.<sup>3</sup> But a mechanic's lien is not merged or destroyed by a judgment against the party personally liable.<sup>4</sup> But an acceptance of an offer for judgment merges all claims that might have been litigated.<sup>5</sup>

§ 467. The judgment of a court of record merges or extinguishes the cause of action on which it is founded. "If there be a breach of contract or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage, and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result; hence, the legal maxim, '*transit in rem judicatam*,' the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher,"<sup>6</sup> provided the cause of

<sup>1</sup> Wyman v. Cockrane, 35 Ill. 154; Ries v. Rowland, 11 F. R. 657; Ins. Co. v. Jones, 8 F. R. 303; Blake v. Downey, 51 Mo. 437; Richardson v. Aiken, 84 Ill. 221; Elliott v. Woodward, 18 Ind. 183; Hanscom v. Hewes, 12 Gray, 334; Ohio v. Gallagher, 93 U. S. 206; Hagg v. Charlton, 26 Pa. St. 202.

<sup>2</sup> Smith v. Mullins, 3 Met. (Ky.) 182.

<sup>3</sup> Kittredge v. Stevens, 16 Cal. 381.

<sup>4</sup> Germania Ass. v. Wagner, 61 Cal. 349.

<sup>5</sup> Davies v. Mayor, 93 N. Y. 250; Robinson v. Marks, 19 Hun. 325.

<sup>6</sup> King v. Hoare, 13 M. & W. 494; Siddall v. Radcliffe, 1 C. & M. 490; Buckland v. Johnson, 15 C. B. 163; Todd v. Stewart, 9 Q. B. 759; Austin v. Mills, 9 Exchq. 288; Hitchen v. Campbell, 3 Wils. 308; Stewart v. Todd, 16 L. J. Q. B. 327; Hillier v. In

action in the two suits is identical.<sup>1</sup> If another action is brought for the same cause, the judgment already recovered against the defendant may be pleaded in bar in the second action.<sup>2</sup> Hence, also, the judgment operates in *estoppel*, that is, is conclusive between the parties upon the merits of the case adjudicated upon; which thereby becomes *res adjudicata*, and cannot be again litigated between the same parties.<sup>3</sup> In an action on a judgment the defendant cannot plead any matter of defense which he might have pleaded in the original action,<sup>4</sup> as a discharge in bankruptcy pending the former action which he then had the opportunity of pleading.<sup>5</sup> Nor can he plead any matter which forms a ground of error in the judgment; but he must resort to a writ of error.<sup>6</sup> Nor can he plead the pendency of a writ of error;<sup>7</sup> for the record can be amended or set aside only by the court which made it, or by a court of error upon sufficient grounds, and upon regular proceedings being taken for that purpose.<sup>8</sup> But in proceedings in bankruptcy against the judgment debtor, the consideration for a judgment debt may be inquired into, because the interests of the other creditors are concerned in the judgment being well founded.<sup>9</sup> Upon the same principle, a judgment recovered against the plaintiff, if given upon the merits of the case, is conclusive and operates in *estoppel* to preclude him from bringing another action for the same cause.<sup>10</sup> A judgment, therefore, in one court is a bar to an action on the same subject matter in any other court.<sup>11</sup>

re, 3 De G. & J. 33; Waterfall, in re, 4 De G. & Sm. 396; Drake v. Mitchell, 3 Lard. 738.

<sup>1</sup> *Stok's Case*, 4 Co. 946; Phillips v. Bertram, 3 Doug. 388; Nelson v. Couch, 33 L. J. C. P. 46.

<sup>2</sup> *Todd v. Stewart*, 9 Q. B. 759; Knapp v. Lee, 42 Mehl. 41.

<sup>3</sup> *Moses v. Macfarlan*, 2 Burr. 1066; *Newington v. Levy*, L. R. 6 C. P. 180; 40 L. J. C. P. 29; *Howlett v. Parte*, 10 C. B. N. S. 813; 31 L. J. C. P. 116.

<sup>4</sup> *Jewsbury v. Mummery*, L. R. 8 C. P. 56; 42 L. J. C. P. 22.

<sup>5</sup> *Todd v. Maxfield*, 6 B. & C. 105;

*Brand v. Weller*, L. R. 2 Ex. 183; 36 L. J. Ex. 100.

<sup>6</sup> *Dock v. Polhausen*, 4 H. & N. 697.

<sup>7</sup> *Doe v. Wright*, 10 Adol. & E. 767; *Riddle v. Canal Co.*, 16 M. & W. 882.

<sup>8</sup> *Hayward v. Robbins*, 4 East. 310; *De Melmar v. Grove*, 10 Q. B. 152.

<sup>9</sup> *Kibble*, in re, L. R. 10 Ch. 373, 44 L. J. B. 63.

<sup>10</sup> *Vooght v. Winch*, 2 Barn. & Ald. 662; *Nav. Co. v. Guillon*, 11 M. & W. 877; *Overton v. Harvey*, 9 C. B. 324; *Newington v. Levy*, L. R. 6 C. P. 180; 40 L. J. C. P. 29.

<sup>11</sup> *Austin v. Mills*, 9 Exch. 288.

Thus, where two personal actions are instituted between the same parties, for the same cause of action, a recovery of judgment in one extinguishes the right to recover in the other.<sup>1</sup> The first judgment merges and extinguishes the cause of action. The maxim, *nemo debet bis videri, etc.*, applies as well where the one action is on a statutory remedy and the other at common law. A litigant having elected one, and having recovered judgment therein, is barred from recovering in the other. He cannot subject the defendant to double costs, as it is against public policy.<sup>2</sup> Thus, a plea of former recovery is good in bar of an action, commenced by attachment in the circuit court by a landlord against his tenant, for the recovery of rent, exceeding in amount the jurisdiction of a justice of the peace, which avers that after the commencement of the suit the plaintiff brought an action before a justice of the peace to recover \$100 for the identical cause of action; that the plaintiff and defendant both appeared before the justice, and thereupon judgment was rendered in said suit before him for the sum of \$100 and costs; and that the judgment was still of full force and vigor.<sup>3</sup> So, a judgment against a garnishee cannot be again litigated by another creditor.<sup>4</sup>

§ 468. So where a compromise was made between the parties pending a suit brought against a municipal corporation by the holder of bonds, issued by such corporation, for the purpose of enforcing the collection of the bonds held by him, by which an amount of recovery less than the face of the bonds, and time of payment were agreed on, and afterwards a judgment was entered in the cause pursuant to the compromise, and carrying its stipulations into execution, the effect of such compromise and the judgment thereon, was to merge the municipal corporation's liability on the bonds in the judgment, thereby destroying the

<sup>1</sup> Brenner v. Moyer, 98 Pa. St. 274.

<sup>2</sup> Brenner v. Moyer, 98 Pa. St. 274; Gavin v. Dawson, 13 S. & R. 247; Wilson v. Hamilton, 9 S. & R. 247; Hess v. Heeble, 6 S. & R. 61; Marsh v. Pier, 4 Rawle, 289; Duffy v. Lytle, 5 Watts, 132; Blyler v. Kline, 64 Pa. St. 180; Baxley v. Linah, 4 Har. Pa. 241; Bark v. Bank, 7 Gill, 426; Davis

v. Bedsole, 69 Ala. 362; Ferrets Case, 6 Co. 9; Spangs Case, 5 Co. 61; Russell v. Farquahar, 55 Tex. 355; Smith v. Stratton, 56 Vt. 362; Gaines v. Miller, 111 U. S. 395; Buldison v. Whitel, 1 W. Bla. 507; Wayman v. Cochrane, 25 Pa. St. 200.

<sup>3</sup> Davis v. Bedsole, 69 Ala. 362.

<sup>4</sup> Smith v. Stratton, 56 Vt. 362.

be taken as a cause of action, and leaving the judgment as the only legal evidence of liability from such corporation to the plaintiff growing out of that transaction. And such a judgment is a bar to any effort made to collect the alleged balance on the bonds so compromised.

The effect of an express term of such compromise and the judgment thereon, that the judgment rendered in pursuance of the compromise was in full satisfaction of the bonds and coupons held by the plaintiff, was to leave the parties as if the plaintiff had never owned or asserted a greater claim against the defendant, than shown by the judgment recovered.<sup>1</sup>

Where a plaintiff brings an action against two parties as partners and recovers judgment and after judgment discovers that there are other members of the firm, the judgment is a bar to an action against the newly discovered partners.<sup>2</sup> In a late English case, where a defendant was jointly interested in a contract made by the plaintiff, with the firm of A. & Co., the defendant recovered judgment for breaches of that contract against members of the firm of A. & Co., other than the defendant. The firm subsequently became bankrupt, and the plaintiff proved against their estate; but, afterwards discovering that the defendant was jointly interested in the contract with the firm of A. & Co., brought an action on that contract against him. It was held, that the action was not maintainable, as the cause of action was merged in the judgments recovered against the other members of the firm of A. & Co.<sup>3</sup> In some states there are statutory provisions allowing such actions to be brought.

§ 469. A judgment against one of several partners, where there is a joint liability, merges the original cause of action; and is a bar to another suit against the remaining parties.<sup>4</sup> Thus

<sup>1</sup> Bank v. R. R., 69 Ala. 365.

<sup>2</sup> *Robertson v. Smith*, 18 Johns. 479; *Ward v. Johnson*, 13 Mass. 118; *Wann v. McNulty*, 7 Ill. 359; *Smith v. Black*, 9 S. & R. 142; *Klog v. Hoare*, 13 M. & W. 195; *Mason v. Edred*, 6 Wall. 231.

<sup>3</sup> *Kendall v. Hamilton*, 8 C. L. J. 43.

<sup>4</sup> *Wann v. McNulty*, 7 Ill. 355; *Thompson v. Emmert*, 15 Ill. 415; *Nichols v. Barton*, 5 Bush, 320; *Nicklaus v. Roach*, 3 Ind. 78; *McMaster v. Vernon*, 3 Duer, 240; *Lampson v. Hart*, 28 Vt. 697; *Candee v. Clark*, 2 Mich. 255; *Averill v. Loucks*, 5 Nev. 93; *Lydam v. Cannon*, 1 Houst. 431; *Stoo v. Lea*, 18 Ohio, 279; U. S.

property seized in admiralty was released to A., as claimant, on his filing a bond with sureties. After final decree for forfeiture, and judgment on the bond, A. and the sureties having become insolvent, suit was brought in equity against B. and the executors of C., praying for relief, on the ground that A., B. and C. were partners, having a joint interest in the property, of which the complainant was ignorant, when the bond was given, and that A. had given the bond at the request and for the benefit of the firm, though he had signed it in his own name. Held, that the judgment against A. was a bar to an action against the other partners, and that the facts stated, in the absence of fraud, misrepresentation, or mistake, afforded no ground for relief in equity.<sup>1</sup> So in an action brought against two or more of the makers of a joint or joint and several note or bond, without including all, it discharges the remainder of them, the obligation being lost in the judgment that binds only those parties against whom it is rendered.<sup>2</sup> A judgment on a bond or contract extinguishes that bond or contract, because there cannot be liabilities on both instruments, and a judgment and a bond both import an absolute liability; the legal obligation of the inferior obligation must be considered as at once blotted out.<sup>3</sup> So a judgment against a joint debtor on a joint cause of action, merges the liability of all, and on the same principle a bond accepted from one

*v. Traffton*, 3 Story, 646; *Crosby v. Jerolman*, 37 Ind. 276; *North v. Mudge*, 13 Iowa, 496; *Scott v. Colmesil*, 7 J. J. Marsh. 416; *Smith v. Black*, 9 S. & R. 142; *Moyle v. Hollins*, 11 G. & J. 11; *U. S. v. Ames*, 99 U. S. 35; *Mitchell v. Brewster*, 28 Ill. 163; *Mason v. Eldred*, 6 Wallace, 231; *Woodworth v. Spaffords*, 2 McL. 168; *State v. Krug*, 94 Ind. 266.

<sup>1</sup> *United States v. Ames*, 99 U. S. 35.

<sup>2</sup> *Pearce v. Kearney*, 5 Hill, 82; *Candee v. Clark*, 2 Mich. 255; *Irwin v. Helgenberg*, 21 Ind. 106; *Stearns v. Aguirre*, 6 Cal. 106; *Archer v. Herman*, 21 Ind. 89; *Barnet v. Juday*, 38 Ind. 86; *Nicklaus v. Roach*, 3 Ind. 78; *Crosby v. Jerolman*, 37 Ind. 264;

*Candee v. Smith*, 93 N. Y. 349; *Robertson v. Smith*, 18 Johns. 459; *Oakley v. Aspinwall*, 4 N. Y. 542; *Snydum v. Barber*, 18 N. Y. 470; *Ehle v. Bingham*, 7 Barb. 494; but is now changed by New Code, in N. Y.; *Bank v. Hart*, 5 Ohio St. 34; *Ohmstead v. Webster*, 8 N. Y. 413.

<sup>3</sup> *Black v. Nettles*, 25 Ark. 606; *North v. Mudge*, 13 Ia. 496; *West, & Co. v. Thornton*, 12 La. Ann. 796; *Gibson v. Smith*, 63 N. C. 103; *Crosby v. Jerolman*, 37 Ind. 264; *Root v. Del.*, 38 Ind. 169; *Grant v. Burgwyn*, 88 N. C. 95; *Platt v. Potts*, 11 Ind. 296; *Higgins' Case*, 6 Co. 45; *Wagner v. Cochrane*, 35 Ill. 152; *U. S. v. Pike*, 9 Howard, 83.

joint debtor for a joint debt discharges the joint liability previously existing upon a simple contract, because since the bond is an obligation for the same debt, the one giving it must be discharged from his liability on the simple contract, as he cannot be liable on both; and if one joint debtor is discharged the other is.<sup>1</sup> An extinguishment of a lower security by a higher is an operation of law, that no intention of the parties can prevent; no matter how explicit an agreement may be, it cannot prevent a promissory note from being merged in a bond given for the same debt; for to allow a debt to be, at the same time, of different degrees and recoverable by a multiplicity of inconsistent remedies, would increase litigation and cause unnecessary and vexatious delay.<sup>2</sup> A judgment on a covenant of warranty for damages for an ouster from part of the land by paramount title, is a bar to a subsequent action on the same covenant to recover an amount which the plaintiff has been obliged to pay the owner of that title for occupying the whole land previously to such ouster.<sup>3</sup> After a *sale fieri* on a mortgage has ripened into judgment, the mortgage is merged in it, and even if null and void is no longer open to attack.<sup>4</sup> So where in an action to foreclose a note and mortgage judgment was rendered on the note, but no order of foreclosure or sale was made, the matter is *res judicata* and the presumption will be made that the lien had been waived or adjudged against the plaintiff.<sup>5</sup> So where a void contract has been merged in a judgment and proceedings in aid of execution are brought to obtain a satisfaction, the parties to the action are estopped from averring or proving such illegality for the purpose of impeaching the judgment, while it remains in force. The remedy is by appeal or in a direct proceeding to set it aside.<sup>6</sup> While the pendency

<sup>1</sup> *Barnet v. Judah*, 28 Ind. 86, *Hallowell v. McDermott*, 8 U. C. C. P. 21.

<sup>2</sup> *Smith v. Nicoll*, 5 Bing. N. C. 208, *Oakley v. Aspenwall*, 4 N. Y. 514, *Roddy v. Bruger*, 1 Ohio, 157; *Turner v. Plowden*, 5 G. & J. 52; *Noke v. Lowe*, 18 Ill. 437; *Fogg v. Sanborn*, 48 Me. 452; *Elliott v. Woodward*, 18 Ind. 183, *North v. Mudge*, 13 Iowa, 496; *Sweet v. Brackett*, 53

Me. 346, *Mitchell v. Mayo*, 16 Ill. 83; *Very v. Watkins*, 18 Ark. 516; *Jones v. Johnston*, 3 W. & S. 276; *Suydam v. Barber*, 18 N. Y. 463; *Bonesteel v. Tod*, 9 Mich. 371.

<sup>3</sup> *Osborne v. Atkins*, 6 Gray, 423.

<sup>4</sup> *Hartman v. Ogborn*, 54 Pa. St. 120; *Johnson v. Murphy*, 17 Tex. 216; *Buhler v. Buffington*, 43 Pa. St. 278.

<sup>5</sup> *Johnson v. Murphy*, 17 Tex. 216.

<sup>6</sup> *Bank v. Stevens*, 1 Ohio St. 232.

of another suit between the same parties, in another state, is not a ground for a plea in abatement, still a judgment rendered in one state by a court having jurisdiction of the suit will operate as a merger of the cause of action, and be bar to the further prosecution of a suit in another state between the same parties and upon the same claim.<sup>1</sup> This doctrine conduces to peace and repose, and cannot be disturbed without unsettling rules of property and producing irreparable mischief.

§ 469. A verdict on an issue in chancery for the information and convenience of the court, will not be conclusive between the parties, unless a decree is made in accordance with the verdict.<sup>2</sup> When the parties agree, expressly or by implication, that a verdict shall be final and conclusive as between them, without the entry of a judgment, it will operate as an estoppel, on proof of the understanding or agreement.<sup>3</sup> It is said that a verdict in a case does not operate as an estoppel until it has received the sanction of the court and passed into a judgment;<sup>4</sup> but it is held that there is an estoppel by verdict as well as by judgment, which is as available to a plaintiff in support of his action as it is to the defendant in defense thereof.<sup>5</sup> The precise application of this rule may be a matter of doubt, as a verdict is always liable to be set aside by the court, on a motion for a new trial, and until it is included in a judgment it certainly cannot be final unless so agreed upon by the parties, or, at least, until the court has determined not to disturb it. So a decision upon an agreed case, or an agreed statement of facts, is final to the extent which it goes. If it is desired to vary the facts or amend the case, that must be done before the decision is announced.<sup>6</sup> So, where court thought a special verdict insufficient, the counsel agreed that the court might find other necessary facts on which to render the judgment; counsel were estopped from alleging that the judgment

<sup>1</sup> *McGilvary v. Avery*, 30 Vt. 338;  
*Barney v. Gibbs*, 31 N. J. L. 317;  
*Bank v. Bank*, 7 Gill, 415.

<sup>2</sup> *Saylor v. Hicks*, 36 Pa. St. 392;  
*Garrison's Appeal*, 38 Pa. St. 531.

<sup>3</sup> *Shaffer v. Kreitzer*, 6 Bin. 422;  
*Estep v. Hutchman*, 14 S. & R. 435.

<sup>4</sup> *Shurneir v. Johnson*, 10 Mett. 319; *Holbert's Estate*, 57 Cal. 257;  
*Ferguson v. Staver*, 40 Pa. St. 213.

<sup>5</sup> *Hanna v. Read*, 102 Ill. 596, S. C.,  
40 Am. R. 608.

<sup>6</sup> *Goodrich v. R. R. Co.*, 38 N. H. 390.

was not rendered on a special verdict.<sup>1</sup> In cases where there is a waiver of a trial by jury, and the court tries the case, is requested to specify the facts found by him, and his conclusions of law, the facts thus specified, if founded on sufficient evidence, are conclusive as *res adjudicata* for all purposes.<sup>2</sup> The removal of the record, by a writ of error, for review in a superior court, will in no way weaken or impair the conclusive effect of the judgment as an estoppel, although it may in some cases operate as a *superseas* of the right to enforce it by execution;<sup>3</sup> but a contrary rule is held in New Hampshire, where it is said that, pending a review of the cause in which the judgment was rendered, it is not final or conclusive, nor can it be pleaded in bar or given in evidence in any suit pending such review.<sup>4</sup>

§ 470. Ordinarily, allegations and averments made in the pleadings are not binding of themselves, and aside from the conclusive effect that may be imparted to them by the judgment; and a declaration or bill filed in one suit cannot ordinarily be read in evidence against the plaintiff in another.<sup>5</sup> But when one party admits the allegations of the other by pleading in confession and avoidance, or controverting one of several averments, and thus impliedly acknowledging the justice of the rest, an estoppel will arise under these circumstances, notwithstanding a protestation that the matters which are not denied are equally untounded with them which are, unless the traverse is sustained by the *verdict*, because it will be presumed that the pleader submitted the strongest point of his case to the jury, and would have been equally unnecessary if he had joined issue on the others.<sup>6</sup> A verdict and judgment on the plea of non assumpsit

<sup>1</sup> *Marius v. Baknell*, 10 Cal. 214.

<sup>2</sup> *Bisell v. Kellogg*, 60 Barb. 417; *Danby v. Goodrich*, 20 Vt. 127; *Anderson v. Whipple*, 34 Mo. 592; *Kilroe v. Howard*, 7 Wis. 150; *Evans v. Bennett*, 7 Wis. 401.

<sup>3</sup> *Doe v. Wright*, 10 Q. B. 73.

<sup>4</sup> *Haynes v. Ordway*, 52 N. H. 284.

<sup>5</sup> *Boilleau v. Rutten*, 2 Exch. 665;

*King v. Norman*, 4 C. B. 884. So one who has represented himself in his own pleadings, in a former suit, as a partner in a certain firm, is estopped from afterwards denying it. *Fowler v. Stevens*, 29 La. Ann. 353.

<sup>6</sup> *Stephen on Pl.* 255; *Bingham v. Stanley*, 2 Q. B. 117; *Hardy v. Williams*, 11 Ircl. 499; *Taylor v. Parkhurst*, 1 Burr. 97; *Chitty v. Dandy*,

in replevin will accordingly be as conclusive in favor of the plaintiff in another action for the same goods, as if the right of property in the declaration had been put in issue and found in his favor, instead of being impliedly admitted.<sup>1</sup>

§ 471. When a court commits a party for contempt, its adjudication is a conviction, and its commitment in consequence is execution; and no court can discharge on *habeas corpus* a person that is in execution by the judgment of any other court having jurisdiction of the subject matter of the contempt,<sup>2</sup> provided such judgment is specific and certain. "Thus an order of commitment for contempt until the further order of the court is too indefinite. All judgments must be specific and certain. They must determine the rights recovered or the penalties imposed; they must be such as the defendant may readily understand and be capable of performing. If his committal had been for a definite period, or until he performed a specified act, then the judgment would have been capable of being reviewed on error, but on such a judgment as this the appellate court cannot know the duration of the imprisonment, and determine whether the confinement is reasonable or is oppressive and wrong; whether it is to extend to days, weeks, months, years or for life, none can certainly know. That is still in the breast of the judge, and is by its terms to be determined in the future, not on a trial or on the performance of any act, but it depends alone on the will of the judge."<sup>3</sup>

§ 472. A motion is an application made to a judge or chancellor, or to the same parties when constituting a court, in open court, for the purpose of obtaining a rule or order directing some

13 A. & E. 323; *Richards v. Allen*, 1 Gibb, 189; *Gould v. Ray*, 13 Wend. 639.

<sup>1</sup> *Wilson v. McClenning*, 23 Ill. 410; *Savage v. French*, 13 Ill. App. 17.

<sup>2</sup> *Phillips v. Welch*, 12 Nev. 158; *Tyler v. Hammersley*, 44 Conn. 393; *Winston*, in re, 9 Nev. 71; *Jones & Cohen*, in re, 5 Cal. 494; *People v. Judge*, 27 Cal. 15; *Penn v. Messenger*,

1 Yeates, 2; *Williamson's Case*, 27 Pa. St. 18; *Gates v. McDaniel*, 4 S. & P. 69; *Stickney*, in re, 40 Ala. 167; *Yates v. Lansing*, 9 Johns. 423; *State v. Towle*, 42 N. H. 544; *Vilas v. Burton*, 27 Vt. 61; *Crosby v. Mayor*, 3 Wils. 98; *New Orleans v. Steamship Co.*, 20 Wall. 387; *Kearney*, in re, 7 Wheat. 38.

<sup>3</sup> *People v. Pilpenbrink*, 12 C. L. N. 41.

act to be done in favor of the applicant. It is usually an incidental proceeding to an action, but it may be wholly distinct from that kind of proceeding. The great variety of objects for which this class of proceedings are available render it impossible to classify the numerous adjudications relating to them, and general principles can only be stated. There may be the following general classification made: First, orders made upon motions respecting collateral questions arising in the course of a trial; second, final orders affecting substantial rights, or motions from the determination of which an appeal lies, and those which are unappealable. All motions affecting the substantial rights of parties are appealable, and, therefore, final, unless reversed or modified by an appellate tribunal, and are placed upon the same basis as any final judgment. Whenever a motion admits of "grave discussion and deliberation, and are made part of the record in a cause and subject to review in another court," the decision by a court upon such motion is generally regarded as a final judgment or adjudication, and the rule of *res judicatae* applies.<sup>1</sup> In a second motion for a new trial based upon the same grounds, and made amid the same circumstances as a former one, which was denied, the denial of the first makes the matter *res judicata*.<sup>2</sup> In a late case the Supreme Court of Wisconsin said: "Without considering the merits of the motion to set aside the verdict and for a new trial in this action, upon which the order of the Circuit Court was made, and from which this appeal is taken, there appear to be two objections, either of which is fatal to this order. First, a motion for the same pur-

<sup>1</sup> *Dwight v. St. John*, 25 N. Y. 203; *Grier v. Jones*, 54 Ga. 154; *Pierce v. Knechtel*, 9 Wis. 23; *Cornwith v. Bank*, 11 Wis. 439; *Langdon v. Halford*, 29 Ala. 592; *Gavin v. Graydon*, 41 Ind. 559; *Hoffman v. Livingston*, 1 Johns. Ch. 211; *People v. Center*, 61 Cal. 191; *Spruley v. Frost*, 15 F. R. 299; *Gregory v. Haynes*, 21 Cal. 443; *Hill v. Hoover*, 9 Wis. 15; *Sanderson v. Daily*, 83 N. C. 67; *Rogers v. Hoenig*, 46 Wis. 361; *Bank v. Upham*, 14 Wis. 596; *Cothren v.*

*Connoughton*, 24 Wis. 131; *Kabe v. Lieb*, 25 Wis. 108; *McCullough v. Clark*, 41 Cal. 298; *Davis v. Cottle*, 3 T. R. 107; *Mitchell v. Allen*, 12 Wend. 260; *Dodd v. Astor*, 2 Barb. Ch. 395; *Gratfield v. Bromley*, 7 T. R. 455; *Benjamin v. Wilson*, 6 L. C. Jur. 246; *Smith v. Lee*, 1 Swec. 385; *Noble v. Cope*, 50 Pa. St. 17; *Commissioners v. McIntosh*, 30 Kans. 234; *Austin v. Walker*, 61 Iowa, 158.

<sup>2</sup> *Mayer v. Wick*, 15 Ohio St. 548; *Rogers v. Hoenig*, 46 Wis. 361.

pose and founded substantially upon the same grounds had been denied, and the matters of such motion had become *res judicata*." Under this rule it is not permissible to renew a motion to issue execution on a dormant judgment after a previous unsuccessful motion to the same effect, from the decision of which no appeal was taken.<sup>1</sup> In the same State it is held that a new action touching a matter that might be settled by motion in the original action will be dismissed.<sup>2</sup> So, where the defendant in a judgment obtains a rule to show cause why execution thereon should not be stayed, and, after depositions are taken, the rule is discharged, said defendant cannot subsequently, upon proof of substantially the same facts appearing in the depositions on the rule, obtain relief by injunction in equity. The principle of *res adjudicata* applies in such case.<sup>3</sup> And where a proceeding by attachment for contempt is instituted as a means of private redress, it may be pleaded in bar of a subsequent action of trespass between the same parties upon the same matter.<sup>4</sup> But the rule as to judgments as estoppels between the parties thereto does not apply to its *full extent* to orders made on motion.<sup>5</sup>

<sup>1</sup> Rogers v. Hoehn, 46 Wis. 361.

<sup>2</sup> Sanderson v. Daily, 83 N. C. 67.

<sup>3</sup> Murrill v. Murrill, 84 N. C. 182.

<sup>4</sup> Frauenthal's Appeal, 100 Pa. St. 290.

<sup>5</sup> Walker v. Fuller, 29 Ark. 448.

<sup>6</sup> McCanalgin, in re, 107 Mass. 170; Dolepus v. Frash, 5 Hill, 493; Dwight

v. St. John, 25 N. Y. 203; Simpson v. Hart, 14 Johns. 63; Van Rensselaer v. Sheriff, 1 Cow. 500; Smith v. Spaulding, 3 Robt. 615; Dickinson v. Gilliland, 1 Cow. 481; White v. Munroe, 33 Barb. 650; Spaulding v. People, 7 Hill, 351; Belmont v. R.R., 52 Barb. 637.

## CHAPTER VII.

## FOREIGN JUDGMENTS AND JUDGMENTS OF OTHER STATES.

SECTION 473. Having considered domestic judgments we now come to still another class of judgments, viz: foreign judgments; and under this head we shall treat of judgments rendered without the United States, and those rendered in other states than those in which they are sought to be used as conclusive evidence, viz: judgments of other States. In regard to judgments rendered in foreign countries, there has been great diversity of opinion among nations and jurists. Assuming that the question of jurisdiction is unimpeachable, the question has been in regard to their status in our courts, whether they are to be considered as conclusive of every fact litigated, or whether new evidence should be permissible to impeach them, or whether they might be examined on their original merits. These judicial determinations are like those already treated of, viz: Judgments *in rem*, *in personam*, and *in rem*, and *in personam*. The latter are again considered under several heads: first, where the judgment is set up by way of defense to a suit in a foreign tribunal; second, where it is sought to be enforced in a foreign tribunal against the original defendant, or his property; and, third, where the judgment is either between the subjects, or between foreigners, or between foreigners and subjects.<sup>1</sup> But in order to found a proper ground of recognition of a foreign judgment, under whichever of these aspects it may come to be considered, it is indispensable, to establish that the court which pronounced it had a lawful jurisdiction over the cause, over the thing, and over the parties. If the jurisdiction fails as to either, it is treated as a mere nullity, having no obligation, and entitled to no respect beyond the domestic tribunals.<sup>2</sup>

<sup>1</sup> Story Conf. Laws, 584, 586; Rose v. Himley, 4 Cranch, 269.

<sup>2</sup> Smith v. Knowlton, 11 N. H. 191; Rangely v. Webster, 11 N. H. 299.

§ 474. Vattel in his Law of Nations says: "It is the province of every sovereignty to administer justice in all places within its own territory and under its own jurisdiction, to take cognizance of crimes committed there, and of the controversies that arise within it. Other nations ought to respect this right, and as the administration of justice necessarily requires that every definitive sentence, regularly pronounced, be esteemed just and executed as such; when once a cause in which foreigners are interested, has been decided in form, the sovereign of the defendants ought not to hear their complaints. To undertake to examine the justice of a definitive sentence is an attack upon the jurisdiction of the sovereign who passed it."<sup>1</sup> Therefore Vattel deduces the general rule, that in consequence of this right of jurisdiction, the decision made by the judge of the place within the extent of his authority, ought to be respected, and to take effect even in foreign countries. And the latest decisions determine that this is inadmissible upon the principle that where a court of competent jurisdiction has solemnly adjudicated either after a contest or confession that a certain amount is due the plaintiff from the defendant, a legal obligation arises to pay that amount, and upon this obligation an action of debt to enforce the judgment may be maintained.<sup>2</sup> While this doctrine seems to be reasonable and just, it can hardly be said that it has been universally applied, by modern nations under the common law. In modern times its application has been far more extensive and uniform than it has been in the jurisprudence of continental Europe.

§ 475. If a sentence or judgment of a court in a foreign country is a proceeding *in rem*, concerning movable property, it

Buchanan v. Rucker, 9 East, 192; Bissell v. Briggs, 5 Mass. 462; Shumway v. Stillman, 6 Wend. 447; Don v. Lippman, 5 C. & F. 1; Cavan v. Stuart, 1 Stark. 525; Bank v. Butler, 29 Me. 19; Noyes v. Butler, 6 Barb. 613; Wood v. Tremere, 6 Pick. 354.

<sup>1</sup> Vattel, P. 166; De Cosse Brissac v. Rathbone, 6 H. & N. 301; Henderson v. Henderson, 6 Q. B. 298; Bank v. Harding, 16 Q. B. 717; Vanquelin v.

Bouard, 15 C. B. (N. S.) 341; Goddard v. Gray, L. R., 6 Q. B. 139; Ochsenbein v. Papelier, L. R. 8 Ch. App. 695; Doghoni v. Cipriani, L. R. 1 H. L. C. 301; Simpson v. F. 20, 1 J. & H. 18; Messina v. Petrocchino, L. R. 4 P. C. 144.

<sup>2</sup> Williams v. Jones, 13 M. & W. 628; Russell v. Smith, 9 M. & W. 819; Cole v. Driskell, 1 Black, 16; Robinson v. Bland, 2 Burr. 1077; Emerson v. Lashley, 2 H. Bl. 248.

is by the general consent of nations conclusive against the whole world. In the celebrated case of *the Rose v. Himely*,<sup>1</sup> Chief Justice Marshall, in delivering the opinion of the court, said: "The power of the foreign court, then is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into; and its authority to decide questions which it professes to decide, must be considered. But although the general power by which a court takes jurisdiction of causes must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty; whether the situation of the particular thing on which the sentence has passed may be inquired into for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example, in every case of a foreign sentence condemning a vessel as a prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question, whether the vessel condemned was in a situation to subject her to the jurisdiction of that court, also examinable? This question, in the opinion of the court, must be answered in the affirmative. Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it would not be contended that this condemnation operated as a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence. Passing from principle to authority, we find, that in the courts of England, whose decisions are particularly mentioned, because we are best

<sup>1</sup> 4 Cranch, 241-272.

acquainted with them, and because, as it is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position, that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified with the limitation, that it has, in the given case, jurisdiction of the subject matter.”<sup>1</sup>

§ 476. “The whole world, it is said, are parties in a prize cause, and therefore the whole world is bound by the decision. The reason on which this dictum stands will determine its extent. Every person may make himself a party and appeal from the sentence; but notice of the controversy is necessary, in order to become a party, and it is a principle of natural justice, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him; where the proceedings are not against the person, the notice is served on the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable, because it is necessary, because it is the part of common prudence for all those who have any interest in it to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to *The Mary* has constructive notice of her seizure, and may be fairly considered as a party to the libel. But those who have no interest in the vessel which could be asserted in a court of admiralty, have no notice of her seizure, and can, on no principle of justice or reason, be considered as parties to the cause, so far as respects the vessel. When such person is brought before the court in which the fact is examinable, no sufficient reason is perceived for precluding him from examining it. The judgment of a court of common law, or the decree of a court of equity, would, under such circumstances, be re-examinable in a court of common law or equity; and no reason is discerned why the sentence of a court of admiralty under the same circumstances should not be re-examinable in a court of equity. The reasoning is not at variance with the decision that the sentence of a foreign court of admiralty, condemning a vessel or cargo, as enemy’s property, is

<sup>1</sup> *Rose v. Himely*, 4 Cranch, 241; *Lothian v. Henderson*, 3 B. & P. 517; *Cheriot v. Foussatt*, 3 Binn. 210; 517.

conclusive in an action against the underwriters on a policy in which the property is warranted to be neutral. It is not at variance with that decision, because the question of prize is one of which the courts of law have no direct cognizance, and because the owners of the vessel and cargo were parties to the libel against them." The rule in England seems to be: that the sentence of a foreign court of admiralty of competent jurisdiction, pronounced *in rem*, is conclusive against the whole world,<sup>3</sup> as to the existence of the ground on which the court professes to decide, and also that unless it be a court of competent jurisdiction, its sentence, far from being conclusive, can have no effect at all. It is a well established principle of international law that the prize court of one belligerent cannot sit in the dominions of a neutral power. It would be a licentious attempt to exercise the rights of war within the bosom of a neutral country."<sup>4</sup> Accordingly, to the sentence of such a tribunal, courts attribute no credit or authority whatever.<sup>4</sup>

§ 477. These sentences, like judgments in a court of common law, are always conclusive as to their own existence, and the legal consequences resulting therefrom. One of those consequences is that the title of the original owner to the property upon which they operate is completely extinguished and transferred to the captors or their sovereign. The English doctrine has, after much deliberation and controversy, received the deliberate sanction of many of our courts. In the Supreme Court of the United States, in Massachusetts, Connecticut, South Carolina and Louisiana, the sentence of a foreign court of admiralty of condemnation for a breach of blockade or as enemy's property, is conclusive evidence, as between the insured and the underwriters, of the fact upon which it is founded. "It is now too late," said Lawrence, C. J., "to examine the practice of admit-

<sup>1</sup> *The Mary*, 9 Cranch, 126, *Imrie v. Castrique*, 8 C. B. N. S. 405.

<sup>2</sup> *Bernadi v. Motteaux*, 2 Doug. 574; *Saloni v. Woodmass*, Park. 152; *Pennell v. Bell*, 4 T. R. 435; *Honeyer v. Lushington*, 1 Camp. 89; *Calneys v. Bovil*, 7 T. R. 323; *Fisher v. Ogle*, 1 Camp. 417; *Dalglish v. Hodson*, 7

Blag. 504.

<sup>3</sup> *The Flad Owen*, 8 T. R. 270; *Oddy v. Bovil*, 7 T. R. 523.

<sup>4</sup> *Havelock v. Rockwoods*, 8 T. R. 276; *Donaldson v. Thompson*, 1 Camp. 429; *Lothian v. Henderson*, 3 B. & P. 524; *Baring v. Claggett*, 3 B. & P. 201.

ting these sentences to the extent to which they have been received. Supposing that practice might at first have appeared doubtful, on the authority of those decisions, men have acted for a long series of years and entered into contracts of assurance in this country, with a knowledge of such decisions, and in expectation that the questions arising out of such contracts, to which the decisions are applicable, will be ruled by them." In Maryland, Pennsylvania, Virginia and New York, it has been reduced by statute to mere *prima facie* evidence. In New York the sentence of condemnation is conclusive to change the property; it is only *prima facie* evidence of the facts upon which it purports to be founded, and in a collateral action such evidence may be rebutted by showing that no such facts ever existed.<sup>1</sup> A sentence of condemnation will be binding upon the right of third parties, as well as on the parties to the original suit: it is conclusive between the assured and the underwriter with respect to every fact which it professes to decide.<sup>2</sup> The sentence of a foreign prize court, though under an edict unjust in itself, contrary to the law of nations, and in violation of neutral rights, is conclusive in respect to the thing itself, and works an absolute change of the property, and is a valid decree, because it is not examinable in other courts. The decree relates back to the capture and affirms a sale made by the captors before condemnation.<sup>3</sup> So a sentence of condemnation of property carried into the port of an ally will not be inquired into by the courts of a neutral country.<sup>4</sup> So a sentence of condemnation of a vessel by an admiralty court for breach of blockade is conclusive of that fact in an action on the policy of insurance.<sup>5</sup> But under a pol-

<sup>1</sup> Smith v. Williams, 2 Caines, 110; Vandeuvel v. Ins. Co., 2 Johns. Cas. 451; Radcliffe v. Ins. Co., 9 Johns. 277; Ins. Co. v. Francis, 2 Wend. 64.

<sup>2</sup> Foster v. Ogle, 1 Camp. 418; Croudon v. Leonard, 4 Cr. 434; Lothian v. Henderson, 3 B. & P. 517; Bolton v. Gladstone, 5 East, 160; S. C., 2 Taunt. 85.

<sup>3</sup> Williams v. Amroyd, 7 Cranch, 423; Imrie v. Castrique, 4 H. L. C.

414; Castrique v. Behrens, 30 L. J. Q. B. 163.

<sup>4</sup> Sheaf v. The Betsey, B. R. 163.

<sup>5</sup> Croudon v. Leonard, 4 Cranch, 434; Bradstreet v. Ins. Co., 3 Sumner, 600; Amroyd v. Williams, 2 W. C. C. 508; S. C., 7 Cranch, 423; Grouing v. Ins. Co., 1 N. & M. 537; Ludlow v. Dall, 1 John. Cas. 16; Whitney v. Walsh, 1 Cush. 29; Peters v. Ins. Co., 3 Sumn. 600; Baxter v. Ins. Co., 6 Mass. 277.

icy of insurance containing a warranty of neutrality, proof of which is to be required in the United States only, a foreign sentence of condemnation is not conclusive evidence of such breach of warranty,<sup>1</sup> nor is it conclusive that the property was not in a neutral.<sup>2</sup>

§ 478. A decree is equally conclusive whichever way it is pronounced. An acquittal will be as effectual in stopping those by whom the vessel has been seized from justifying their conduct on the ground that the property had incurred forfeiture, as a sentence of condemnation would be in stopping the owner from averring that the seizure was illegal and that no forfeiture had occurred.<sup>3</sup> A sentence of condemnation completely extinguishes the title of the original owner and transfers a rightful title to the captor or his sovereign. So a decree of condemnation for the breach of a municipal regulation is valid though the vessel be lying in the port of a neutral friendly power.<sup>4</sup> But while all foreign judgments *in rem* are conclusive they are so far examinable as to ascertain whether the tribunal had jurisdiction of the subject matter consistently with the law of nations.<sup>5</sup>

§ 479. It is the duty of the Admiralty Court of one nation—a duty arising from international comity—to enforce the decree of an Admiralty Court of another nation upon a subject over which the latter had jurisdiction. Accordingly, where an English vessel, after having collided with and sunk a Portuguese one, put into Lisbon and was there proceeded against, and a judgment for damages from the collision rendered against it in the courts of Portugal.—*Held*, that the English Admiralty Court would entertain a suit to enforce the judgment *in rem*. In the decision of this case the court said: “The original proceeding, being for the purpose of enforcing a maritime lien, which by the

<sup>1</sup> *Ins. Co. v. Woods*, 6 Cranch 29.

*royal*, 7 Cranch, 423.

<sup>2</sup> *Maly v. Shattuck*, 3 Cranch, 459; *Fitzsimmons v. Ins. Co.*, 4 Cranch, 185.

<sup>4</sup> *Hudson v. Guestier*, 4 Cranch, 293.

<sup>5</sup> *The Star*, 3 Wheat. 75; *Gelston v. Hoyt*, 3 Wheat. 246; *Williams v. Am-*

<sup>5</sup> *Rose v. Himely*, 4 Cranch, 344, S. C., *Bec*, 300; *Bradstreet v. Ins. Co.*, 3 Sumner 600; *Imrie v. Cas- trique*, 8 C. B. N. S. 405.

law of all foreign codes founded on the civil law, and which is now advanced for repairs and necessities on a vessel arrested in port, being *in rem*." This court is now called upon to enforce the judgment *in rem* given by the court of the country where the enforcement of a judgment *in rem* given by a foreign court. With respect to the objection that the authorities which have been cited in support of the course taken by the court, it must be observed that until a recent period, the reports of the courts exercising jurisdiction in the Admiralty, with the civil law, that is, of the Ecclesiastical and Admiralty Courts; moreover, it is to be remembered that, speaking generally, any court which exercises a jurisdiction *in rem* has a power to some substitute for it in the shape of a security, which is not, and the wrong doer is seldom able to evade compensation in the order of the court. This court, on failure of the owners to pay for the damage alleged to be done by their ship, would arrest that ship, and enforce the judgment against the *res* by sale. The occasion for the exercise of such a power of arrest seldom arises, though in a recent case, that of *The Troubadour*, in 1878 (not reported), the court directed the issue of a warrant after judgment for the purpose of enforcing the payment of the award of salvage, and there have been several instances in which a ship has been arrested or re-arrested in consequence of the ship becoming insolvent. In fact, what the common-law courts do indirectly by implying a contract, the Admiralty Court does directly and without any such implication on the grounds of international equity. It is clearly for the interests of justice that these courts should exercise the jurisdiction as prayed, and, having taken up the *res*, should not take it off until the sentence is executed. Otherwise the wrong-doer might remove his ship out of the jurisdiction, and, by keeping out of Portuguese waters, defeat the just rights of the party who has suffered the damage. It is to be borne in mind that this ship, the *City of Melbourne*, is the ship which did the damage done by her to the plaintiff's property, and is liable in a manner that no other ship of the same name could be liable. Upon the whole, I do not see why, if the Admiralty Court might ever have enforced a foreign judgment, and the authorities are ample on this point—it may not enforce that judgment against the ship, and give that remedy *in rem* which is

one of the special advantages incident to the jurisdiction of the Court of Admiralty.<sup>1</sup>

§ 480. The judicial acts of one nation are to be respected by another, and are conclusive on the subjects of the other relative to all matters within the national jurisdiction; but in order to render them conclusive it is further necessary that they should be matters cognizable by the court and fairly decided. The sentence of a foreign court of competent jurisdiction acting *in rem*, is conclusive in respect to the matter on which it directly decides. If, however, the proceedings are not merely irregular and illegal, but were founded in fraud, they are not conclusive, and this may be shown *affronte*. In order to make the sentence conclusive, it must appear that there have been proper judicial proceedings, with some personal or public notice to the parties. A judgment of condemnation by a foreign tribunal not properly constituted is not only of no effect as an estoppel in another action, but is a mere nullity; but the presumption is that it is properly constituted, unless the constitution of it be known. All sentences of foreign courts of admiralty condemning goods as enemy's property are *prima facie* evidence of such fact, but may be invalidated by the evidence contained in the record itself. Concealment of facts afford no ground to avoid a sentence of a foreign court acting *in rem*; but where a foreign court not of admiralty has decided a case professedly but erroneously on our law, our courts are not concluded by such a decision.<sup>2</sup>

§ 481. Judgments *in rem* being conclusive upon the thing itself in the *forum* in which they originate, if the tribunal has jurisdiction and has acted within its jurisdiction, they will continue to be so in any foreign tribunal in which they are called in question.<sup>3</sup> When a judgment is founded on the ground that the

<sup>1</sup> *The Bold Buccleugh*, 7 Moo. P. C. 267; *The Cry of Mocha* 41 L. T. R. (N. S.) 759; *Prabnow v. Doore*, 3 D. R. 54; *Warr's Case*, Robt. Ab. 530; *Molloy, De Jure Maris*, b. 3, c. 9, § 9; *Jurado v. Gregory*, 1 Vent. 32; *Ewer v. Jones*, 2 Ld. Raym. 944; *Hughes v. Cornelius*, 2 Shower, 232.

<sup>2</sup> *Castrique v. Behrens*, 30 L. J. Q.

B. 163; *Williams v. Armroyd*, 7 Cranch, 423; *Cammell v. Sewell*, 3 H. & N. 617; *Imrie v. Castrique*, 8 C. B. N. S. 405.

<sup>3</sup> *Burnham v. Webster*, 2 W. & M. 172; *Moore v. Chicago, &c. Co.*, 43 Iowa, 385; *Ennis v. Smith*, 14 How. 400; *Castrique v. Imrie*, L. R. 4 App. Cas. 414; *Simpson v. Fogo*, 29 L. J. Q.

goods are enemy's property, it is conclusive that the property belongs to the enemies not only for the immediate purpose of such sentence, but it is binding on all courts and all persons,<sup>1</sup> and the sentence is binding whether it proceeds to condemn the ship expressly as being enemy's property or whether such a ground of decision can only be collected from other parts of the proceedings.<sup>2</sup> Whenever the matter in controversy is land or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation as to all the matters of the right and title which it professes to decide in relation thereto, it is necessarily beyond the reach of revision by foreign tribunals when originally pronounced. This results from the very nature of the case, for no other court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of nations, therefore, in case of immovables the judgment of the *forum rei sitæ* is held absolutely conclusive. "*Immobilia ejus jurisdictionis esse reputantur ubi sita sunt.*" while the *converse* is also well settled, that a judgment in any foreign country touching such immovables is of no obligation whatever.<sup>3</sup>

§ 482. In order to affect property so as to vest a title, as against third parties, the court must have jurisdiction over it, on the principle of the *lex rei sitæ*. When the property or thing is situate within the jurisdiction of the court, proceedings *in rem* give a title to it against all the world. "When a tribunal, no matter where located, has to determine between two parties and

657; *Imrie v. Castrique*, 8 C. B. N. S. 1; *Geyer v. Aguilar*, 7 T. R. 696; *Hobbs v. Henning*, 17 C. B. N. S. 791; *Baudac v. Nicholson*, 4 Miller (La.) 81; *Thomas v. Southard*, 2 Dana, 475; *Croudon v. Leonard*, 4 Cranch, 434; *Kindersley v. Chase*, Park Ins. 490; *Henderson v. Henderson*, 6 Q. B. 288; *Ferguson v. Mahon*, 11 A. & E. 179; *Bank v. Nias*, 16 Q. B. 717; *Baring v. Claggett*, 3 B. & P. 24; *Munroe v. Pilkington*, 2 B. & S. 11; *Bolton v. Gladstone*, 5 East, 160; *Blad v. Bamfield*, 3 Swanst. 60; *Vauquelin v. Bouard*, 15 C. B. N. S. 341;

*De Cosse Brissac v. Rathbone* 6 H. & N. 301; *Scott v. Shearman*, 1 W. Bl. 977; *Roberts v. Fortnum*, H. L. 468; *Henshaw v. Pleasant*, 2 W. Bl. 1174; *Papillon v. Buckner*, H. L. 478; *Terry v. Huntington*, H. L. 480.

<sup>1</sup> *Kindersley v. Chase*, 2 Park Ins. 743; *Graham v. Maxwell*, 2 Dow. 314; *Hamilton v. Ins. Co.*, 8 Bro. P. C. 264; *Baring v. Claggett*, 3 B. & P. 214.

<sup>2</sup> *Bolton v. Gladstone*, 5 East, 155; *Christie v. Secretan*, 8 T. R. 196.

<sup>3</sup> *Story's Confl. of Laws*, § 591.

between them only, the decision, though in general binding between the parties and privies, does not affect the right of third parties: and if, in the execution of the judgment of such tribunal, process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person from setting up his claim to that thing, for the tribunal neither had jurisdiction to determine, nor did they determine, any thing more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing. But when the tribunal has jurisdiction to determine, not merely on the rights of the parties, but on the disposition of the thing, and does, in the exercise of that jurisdiction, direct that the thing, and not merely the interest of any particular party in it, be sold or transferred the case is very different." In such cases the title is perfect everywhere. Such has always been the rule in proceedings in admiralty, and it is universally applicable to proceedings *in rem*. Thus in an action on a policy of insurance, the sentence of a foreign court of admiralty, condemning the property insured as enemies' property, is conclusive evidence as to the nature of the property.<sup>1</sup>

§ 483. The same principles are applied to all other cases of proceedings *in rem*, where the subject is movable property within the jurisdiction of the court pronouncing the judgment. Whatever the court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign courts of admiralty, whether they are causes of prize, or of bottomry, or of salvage,

<sup>1</sup> *Casrique v. Harb*, 1 H. L. 414; *Strang v. Ins. Co.*, L. R. 1 Q. B. 676.

<sup>2</sup> *Brown v. Ins. Co.*, 4 Q. B. 172; *Bernardi v. Motteux*, Douz. 574; *Baring v. Lewis*, Park, 469; *Salland v. Woodmass*, Park, 471; *Gosier v. Aguilar* 7 T. R. 696; *Christie v. Secretan*, 8 T. R. 193; *Lothian v. Hender-*

*son* 3 B. & P. 499; *Baring v. Assurance Co.*, 5 East, 99; *Pollard v. Bell*, 8 T. R. 434; *Balton v. Gladstone*, 5 East, 155; *Dempsey's Case*, 1 Binn. 299; *Cronson v. Leonard*, 4 Cranch, 424; *Bunting's Case*, 4 Co. 29; *Hughes v. Cornelius*, 2 Show. 202; *Stewart v. Warner*, 1 Conn. 142.

or of forfeiture, or of any of the like nature, over which such courts have a rightful jurisdiction founded on the actual or constructive possession of the subject matter.<sup>1</sup> The same rule is applied to other courts proceeding *in rem*, such as the Court of Exchequer in England, and to all courts exercising a like jurisdiction *in rem* upon seizure.<sup>2</sup> And in cases of this sort it is wholly immaterial whether the judgment be of acquittal or of condemnation. In both cases it is equally conclusive.<sup>3</sup>

§ 484. But the doctrine of conclusiveness, however, is always to be understood with this limitation, that the judgment has been obtained *bona fide* and without fraud; for if fraud is shown it will avoid the force and validity of the sentence.<sup>4</sup> It is said that a foreign judgment obtained by the fraud of a party to the suit in the foreign court cannot be afterwards enforced by him in an action brought in an English court, although the question whether the fraud had been perpetrated was investigated in the foreign court, and it was there decided that the fraud had not been committed.<sup>5</sup> So it must appear that there have been regular proceedings upon which to found the judgment or decree; and that the parties in interest *in rem* have had notice or an opportunity to appear and defend their interest, either personally or by their proper representative, before it was pronounced; for the common justice of all nations requires that no

<sup>1</sup> Williams v. Armroyd, 7 Cranch, 423; Rose v. Himely, 4 Cranch, 241; Hudson v. Guestier, 4 Cranch, 293; Mary, The, 9 Cranch, 126; Grant v. McLachlin, 4 Johns. 34; Peters v. Ins. Co., 2 Sumn. 389; Bradstreet v. Ins. Co., 3 Sumn. 600; Magoun v. Ins. Co., 1 Story, 157; Crousdon v. Leonard, 4 Cranch, 423.

<sup>2</sup> Gelston v. Hoyt, 3 Wheat. 246.

<sup>3</sup> Crousdon v. Leonard, 4 Cranch, 423; Williams v. Armroyd, 7 Cranch, 423; Rose v. Himely, 4 Cranch, 241; Hudson v. Guestier, 4 Cranch, 293; The Mary, 9 Cranch, 126; Grant v. McLachlin, 4 Johns. 34; Peters v. Ins. Co., 3 Sumn. 389; Bland v. Bamfield, 3 Swanst. 604; Bradstreet v. Ins. Co.,

3 Sumn. 600; Magoun v. Ins. Co. 1 Story, 157; Hobbs v. Henning, 17 C. B. 791; Bolton v. Glastone, 5 East 155; Bernardi v. Motteux, 2 Doug. 574; Baring v. Claggett, 3 B. & P. 211; Lothian v. Henderson, 3 B. & P. 499; Stewart v. Warner, 1 Conn. 142; Dempsey v. Ins. Co., 1 Ben. 20; Baxter v. Ins. Co., 6 Mass. 211; Christie v. Secretan, 8 T. R. 192; Russell v. Ins. Co., 4 Dall. 421; Richardson v. Jones, 8 Mass. 536.

<sup>4</sup> The Duchess of Kingston's Case, 20 How. St. Tr. 355; Bradstreet v. Ins. Co., 3 Sumn. 600; Magoun v. Ins. Co., 1 Story, 157.

<sup>5</sup> Aboulloff v. Oppenheimer, 10 Q. B. Div. 295.

condemnation should be pronounced before the party had an opportunity to be heard.

§ 486. The sentence of a foreign court will not be conclusive under the following circumstances: 1<sup>st</sup>. If a foreign sentence of condemnation as prize is manifestly erroneous, as if it professes to be made on particular grounds, which are set forth, but which plainly do not warrant the decree, the sentence will not be conclusive as to such facts. 2<sup>d</sup>. Or on grounds contrary to the law of nations. 3<sup>d</sup>. Or if there be an ambiguity as to what was the ground of condemnation.<sup>2</sup> 4<sup>th</sup>. If the foreign court is constituted by persons interested in the matter in dispute, the judgment is not binding.<sup>3</sup> Sentences of condemnation of foreign courts of prize are conclusive, only where such courts are constituted, according to the law of nations, and exercised either in the belligerent country, or in the country of a co-belligerent or ally in the war.<sup>4</sup> A sentence of condemnation, pronounced by the authority of the capturing power, within the dominions of neutral territory, to which the prize may be taken, is illegal,<sup>5</sup> and therefore is not even admissible as evidence to falsify the warrant of neutrality. Every foreign admiralty sentence depends for its operation upon the jurisdiction of the court pronouncing it. If jurisdiction is lacking all is lacking, and the proceedings are utterly null and void.<sup>6</sup> Any tribunal before which such a sentence is sought to be used has the right of examining freely into the matter, and deciding whether the foreign tribunal which rendered the sentence had jurisdiction or not. Jurisdiction may depend upon the state of the *res* on which the decree was intended to operate, if, for instance, a prize court should be induced to condemn as prize of war a vessel which was never captured, such a condemnation as that would certainly not

<sup>1</sup> *Colvert v. Boell*, 7 T. R. 523; *Pillard v. Beil*, 8 T. R. 434.

<sup>2</sup> *Dalglish v. Holburn*, 7 Buz. 497; *Henderson v. Henderson*, 6 Q. B. 288; *Valle v. Demerqui*, 4 Exch. 290; *Reynolds v. Fenton*, 3 C. B. 187; *Cowan v. Bradwood*, 1 M. & G. 882; *Ferguson v. Mahon*, 11 A. & E. 179.

<sup>3</sup> *Price v. Dewhurst*, 8 Sim. 279; *Sawyer v. Ins. Co.*, 12 Mass. 261; *Bradstreet v. Ins. Co.*, 3 Sumn. 600; *Magoon v. Ins. Co.*, 1 Story, 157.

<sup>4</sup> *Osby v. Bovil*, 2 East. 473.

<sup>5</sup> *Havelock v. Rockwoods*, 8 T. R. 298; *Donaldson v. Thompson*, 1 Camp 429.

<sup>6</sup> *Rose v. Hinley*, 4 Cranch, 241.

transfer any property; so if the prize courts should lose possession, as by recapture, voluntary discharge or escape, the prize courts of the captor would thereby lose jurisdiction. But not if the captor has possession of the *res* in a neutral port, the port of an ally, or of a nation under control of the sovereign, and the *res*, though remaining there as within the jurisdiction of the court of the captor. The jurisdiction of a prize court may depend upon its natural character, the prize court of an ally of the captor has no right to condemn, and the court of a neutral cannot; it may also depend upon the place where the court sits; it cannot act in neutral territory; if it does, the proceedings are void.<sup>1</sup> But it may sit in the territory of an ally. An appeal from a sentence of a prize or admiralty court prevents it having the force and effect of *res judicata*, and as long as the appeal is undetermined the decree proves nothing.

§ 487. In a leading case in England the court say: "We think that some points are clear. When a tribunal, no matter whether in England or a foreign country, has to determine between two parties, and between them only, the decision of that tribunal, though in general binding between the parties and privies, does not affect the rights of third parties, and if in execution of the judgment of such a tribunal process issues against the property of one of the litigants, and some particular thing is sold as being his property, there is nothing to prevent any third person setting up his claim to that thing, for the tribunal neither had jurisdiction to determine, nor did determine, anything more than that the litigant's property should be sold, and did not do more than sell the litigant's interest, if any, in the thing. All proceedings in the courts of common law in England are of this nature, and it is every day's experience that where the sheriff, under a *perpetuam facias* against A., has sold a particular chattel, B. may set up his claim to that chattel, either against the sheriff or the purchaser from the sheriff. And if this may be done in the courts of the country in which the judgment was pronounced, it follows of course that it may be done in a foreign country. But when the tribunal has jurisdiction to determine not merely on the rights

<sup>1</sup> *Hudson v. Guestier*, 4 Cranch, 293.

of the parties, but also on the disposition of the thing, and does in the exercise of that jurisdiction direct that the thing, and not merely the interest of any particular party in it, be sold or transferred, the case is very different.

"It is not essential that there should be an actual adjudication on the status of the thing. Our courts of admiralty, when property is attached and in their hands, on a proper case being shown that it is perishable, order for the benefit of all parties concerned that it shall be sold, and the proceeds paid into court, to abide the event of the litigation. It is almost essential to justice, that such a power should exist in every case where property, at all events perishable property, is detained. \* \* \*

"We very observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the first part of the preceding section quoted from Story. We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the State under the authority of which the court sits: and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world."

§ 488. Proceedings also by creditors against the personal property of the debtor, in the hands of third persons, or against debts due to him by such third persons (commonly called the process of foreign attachments, or garnishment, or trustee process), are in some sense proceedings *in rem*, and are deemed entitled to the same consideration.<sup>1</sup> But in this class of cases it must be especially understood that to make any judgment effectual, the court must possess and exercise a rightful jurisdiction over the *Res*, and also over the person; at least, so far as the *Res* is concerned; otherwise it will be disregarded. And if the

<sup>1</sup> *Castrique v. Imrie*, L. R. 4 Eng. Hull v. Blake, 13 Mass. 153; *McDaniel & Ir. App* 427-9. Hughes, 3 East, 367; *Phillips v. Hunter*,

<sup>2</sup> *Holmes v. Remsen*, 20 Johns 229: 2 H. Bl. 493.

jurisdiction over the *Res* be well founded, but not over the person except as to the *Res*, the judgment will not be either conclusive or binding upon the party *in personam*, although it may be *in rem*.<sup>1</sup> In all these cases the same principle prevails, that the judgment acting *in rem* shall be held conclusive upon the title, and the transfer and disposition of the property itself, in whatever place the same property may afterwards be found, and by whomsoever the latter may be questioned; and whether it be directly or incidentally brought in question,<sup>2</sup> and is a complete protection to the garnishee against the original creditor. In these cases, as in cases of domestic judgments *in rem*, the judgment is conclusive upon the title, transfer and disposition of the *Res*, wherever it may afterwards be found, and by whomsoever questioned, whether directly or incidentally brought in question.

§ 489. Foreign judgments *in personam* differ somewhat in their conclusive effect from those we have just disposed of. The principle that that which has been once settled by litigation shall not again be litigated, applies to some extent to foreign judgments. A question settled abroad by courts of competent jurisdiction between actual parties, after trial, will not be subject to any further litigation between the same parties. The presumption naturally arises that all the defenses which the losing party has, were made and were unavailable. "*Interest reipublice res judicatus non rescindit*."<sup>3</sup>

§ 490. There is a wide distinction between the effect of a foreign judgment when the plaintiff seeks to make the judgment the basis of a judgment in another sovereignty than that in which the judgment was rendered and when the party against whom it was rendered seeks to avail himself of such prior foreign judgment as a defense to an action upon the original

<sup>1</sup> *Bissell v. Briggs*, 9 Mas. 468.

<sup>2</sup> Story's Conflict of Laws, § 592; *Taylor v. Phelps*, 1 H. & G. 492; *Le Chevalier v. Lynch*, 1 Doug. 170; *Phillips v. Hunter*, 2 H. Bla. 402; *Holmes v. Remsen*, 4 Johns. Ch. 460; *Embree v. Hanna*, 5 Johns. 101;

*McDaniel v. Hughes*, 3 L. r., 367; *Wilkinson v. Hall* 6 Gray, 568; *Bailey v. Douglas*, 19 Vt. 98; *Kimball v. Gay* 16 Vt. 131, *Chase v. Houghton*, 16 Vt. 594.

<sup>3</sup> *Lazier v. Westcott*, 26 N. Y. 146; *Barber v. Lamb*, 8 C. B. N. S. 95; *Kelall v. Marshall*, 1 C. B. N. S. 24.

cause as a plea in bar or *pro re judicata*. A foreign judgment when presented to a domestic court by the party in whose favor it was rendered, as the ground-work for a domestic judgment, may be impeached by the party against whom it was rendered, upon the ground of the incompetency of the court rendering it for want of jurisdiction or the gross injustice of the judgment on international principles. But when the party against whom the judgment is rendered pleads that the plaintiff on the same cause of action has already procured him or his property to judgment in a foreign land, it is a principle of natural justice that the plaintiff having thus elected his tribunal, be it competent or incompetent, and having pressed the action to judgment upon the defendant's appearance, should be estopped *pro tanto* from vexing the defendant elsewhere on the same cause of action. "*Nemo debet bis eari, si constat eundem quod sita pro una et eadem causa.*" This principle is of universal application to all judgments, and is applied not only to domestic judgments but to judgments of other states,<sup>1</sup> on the ground of merger, provided the court had jurisdiction of the subject matter and the parties were properly brought before it; but where there is no jurisdiction *in personam*, there can be no merger.<sup>2</sup>

§ 491. Where the final judgment of a foreign court has adjudged a certain sum to be due from one person to another, a legal obligation arises to pay that sum, which may be enforced by an action in the courts of this country. The judgment, not being matter of record in this country, the debt here created is a simple contract debt.<sup>3</sup> It is conclusive upon the merits of the

<sup>1</sup> *Haxby v. Lynch*, 16 Pa. St. 241; *19 B. & C. v. Redden*, 6 H. & N. 49; *Barrows v. Dunn*, 1 St. 73; *Wheeler v. Tucker & Co.*, 45 N. H. 517; *Lechler v. Lawson*, 45 T. Hunt. 86; *Bank v. Bank*, 7 G. 3, 415; *Tarlton v. Tarleton*, 4 M. & S. 20; *Bank v. Jones*, 2 L. J. Q. B. 284; *Bank v. Brown*, 50 Maine, 214; *Taylor v. Phelps*, 1 H. & C. 492; *Barber v. Lamb*, 8 C. B. N. S. 53; *Croisique v. Imrie*, 59 L. J. C. P. 253; *Griswold v. Percin*, 2 Conn. 85; *Cleaves v. Lord*, 42 Maine, 290; *Napier*

*v. Gidre*, 5 Spears Ch. 215; *Goddard v. Gay*, 1 L. J. Q. B. 62; *Ryland v. Robert*, 23 Pa. St. 215; *Ricardo v. Garcias*, 12 C. & P. 398; *McGulvay v. Avery*, 39 Vt. 538; *Andrews v. Montgomery*, 19 Johns. 162; *Bank v. Wheeler*, 28 Conn. 43.

<sup>2</sup> *Bank v. Butman*, 27 Me. 19; *McVicker v. Beedy*, 31 Me. 314.

<sup>3</sup> *Williams v. Jones*, 13 M. & W. 633; *Walker v. Wither*, 1 Dougl. 1; *Hall v. Odher*, 11 East. 118; *Atkins v. Braybrooke*, 4 Campb. 380;

matter adjudicated upon, both in law and fact, consequently no defense can be raised which was open to the party in the original suit. Nor the pendency of the judgment on appeal, or the pendency of an action in a foreign tribunal at the time of the action in this country.<sup>1</sup> Judgments in foreign courts are not upon the same footing as judgments in our own courts of record. They do not bar or stay an action *ex contractu*.<sup>2</sup> But judgment recovered in a foreign court, and payment of the sum recovered, is a good bar to the same cause of action.<sup>3</sup>

§ 492. The judgment must be conclusive where it is pronounced.<sup>4</sup> The point must clearly appear to have been decided. If the proceedings are so defective that this cannot be ascertained, the judgment is not conclusive.<sup>5</sup> It may be avoided by showing want of jurisdiction over the person of the defendant, as that he was a foreigner, and not resident within or amenable to the jurisdiction.<sup>6</sup> Or by showing a want of jurisdiction over the sub-

Goddard v. Gray, L. R. 6 Q. B. 148; Schibby v. Westenholz, L. R. 6 Q. B. 159; Meyer v. Ralli, L. R. 1 C. P. D. 369; Duplex v. De Roven, 2 Vern. 540; Philpott v. Adams, 7 H. & N. 888; Russell v. Smyth, 9 M. & W. 810; Harris v. Saunders, 4 B. & C. 411; Douglass v. Forrest, 4 Bing. 686; Scott v. Pilkington, 2 B. & S. 311; Patrick v. Shedden, 2 E. & B. 14; Sadler v. Robbins, 1 Camp. 253; Grant v. Easton, 49 L. T. 645.

<sup>1</sup> Ricardo v. Garcias, 12 Cl. & F. 368; De Cosse-Brissac v. Rathbone, 6 H. & N. 301; Henderson v. Henderson, 6 Q. B. 288; Bank v. Nias, 16 Q. B. 717; Ellis v. McHenry, L. R. 6 C. P. 228; Goddard v. Gray, L. R. 6 Q. B. 139; Scott v. Pilkington, 3 B. & S. 11; Messina v. Petrochino, L. R. 4 C. P. 144; Vanquelin v. Bouard, 13 C. B. N. S. 341; Ellis v. McHenry, L. R. 6 C. P. 228; The Delta, 1 P. D. 393; Phosphate Co. v. Molleson, 1 App. Cas. 780; Norton v. Land Co., 7 Ch. D. 332; Barber v. Lamb, 8 C. B. N.

S. 95; Kelsall v. Marshall, 1 C. B. N. S. 241.

<sup>2</sup> Hall v. Odber, 11 East, 124; Smith v. Nicolls, 5 Bing. N. C. 208; Plummer v. Woodburne, 4 B. & C. 625; Vanquelin v. Bouard, 15 C. B. N. S. 341; Scott v. Pilkington, 2 B. & S. 11.

<sup>3</sup> Barber v. Lamb, 8 C. B. N. S. 95; 29 L. J. C. P. 234.

<sup>4</sup> Plummer v. Woodburne, 4 B. & C. 625; Smith v. Nicolls, 5 Bing. N. C. 222; Frayes v. Worms 10 C. B. (N. S.) 149.

<sup>5</sup> Obicini v. Blich, 8 Bing. 335; Sadler v. Robins, 1 Camp. 253; Colandrea v. Dittrich, 4 M. & Gr. 62; Behrens v. Sereking, 2 M. & Cr. 2.

<sup>6</sup> Schibby v. Westenholz, L. R. 6 Q. B. 155; Smith v. Nichols, 5 B. & N. C. 208; Buchanan v. Rucker, 9 East, 192; Guinness v. Carroll 1 B. & A. 463; Vanquelin v. Bouard, 15 C. B. N. S. 341; Nav. Co. v. Gullion, 11 M. & W. 894; Ferguson v. Mahon, 11 A. & E. 179; Don v. Lipman, 5 Cl. & F. 1; Price v. Dewhurst, 8 Sim. 272.

ject matter,<sup>1</sup> and by showing that the court decided according to a rule of law which is not recognized by any other country of the civilized world. Or that the proceedings were contrary to natural law.<sup>2</sup> May also plead that it was obtained by fraud<sup>3</sup> and the plaintiff may show, where the defendant is seeking to avail himself of the judgment, as a bar to an action against him, that the defendant was not served in the foreign action, and therefore it is a nullity.<sup>4</sup> Or that the claim sued on was not included in the foreign suit where judgment is pleaded in bar.<sup>5</sup> Or where the same defense was pleaded, that it had been adjudicated. A court will not presume the existence of a debt or legal obligation by reason of a foreign judgment, as of the Queen's Bench, in *Comila*—where the person sought to be charged has not been offered an opportunity to make defense, unless every fact necessary to authorize the foreign tribunal, under the laws of the place, to render such judgment, is made to appear affirmatively.<sup>6</sup>

§ 493. A foreign judgment is conclusive in an action here involving the same subject matter, so as to prevent a re-trial on the merits. But the jurisdiction of the foreign court, its power over the parties, and the matters in controversy, may be inquired into; and it may be impeached for fraud, but if it is not impeached it is conclusive, and it is conclusive to show by way of defense that the subject matter has once passed *in rem judicata*. In regard to *judgments in personam* which are sought to

<sup>1</sup> *Nichols v. Ross*, 2 D. & A. 757.

<sup>2</sup> *Booth v. Baker*, 1 Camp. 163; *Pearce v. Dowdall*, 5 Sim. 279; *Ferguson v. Mason*, 11 A. & E. 179; *Simpson v. Paine*, 1 H. & N. 195; *Reynolds v. Fenton*, 3 C. B. 187; *Maine v. v. Hinton*, L. R. 3 C. 479.

<sup>3</sup> *Boyles v. Orr*, 1 H. & C. Ex. 461; *Price v. Dowdall*, 1 M. & C. 76; *Olsenstein v. Papellier*, L. R. 8 Ch. 695; *Blake v. Smith*, 5 Sim. 369; *Sinclair v. Fraser*, 1 Doug. 4.

<sup>4</sup> *Smith v. Nichols*, 5 Bing. N. C. 208; *Buchanan v. Rucker*, 9 East, 192; *Schibsky v. Westenholtz*, L. R. 6 Q. B. 155; *O'Rourke v. Ry. Co.*, 55 Iowa, 332.

<sup>5</sup> *Burnham v. Webster*, 1 Wood. & M. 172; *Barrus v. Bidwell*, 3 Woods C. C. 5.

<sup>6</sup> *Keir v. Condy*, 9 Bush, 372.

<sup>7</sup> *Rankin v. Goddard*, 51 Me. 28; S. C., 55 Me. 289; *Lazier v. Westcott*, 26 N. Y. 146; *Barney v. Patterson*, 6 H. & J. 182; *James v. Allen*, 1 Dall 188; *Thompson v. Tolmie*, 4 Johns. Ch. 460; *Embree v. Hanna*, 3 Johns. Ch. 101; *Bissell v. Briggs*, 9 Mass. 462; *Homer v. Parker*, 3 Mason, 247; *Crousdon v. Leonard*, 4 Cranch, 434; *Smith v. Lewis*, 3 Johns. 168; *Wheeler v. Raymond*, 8 Cowen, 311; *Henderson v. Henderson*, 6 C. B. 288; *Ferguson v. Maher*, 11 A. & E. 179;

be enforced by a suit in a foreign tribunal, there has certainly been no inconsiderable fluctuation of opinion in the English courts upon this subject. It is admitted on all sides that in such cases, the foreign judgments are *prima facie* evidence to sustain the action, and are to be deemed right until the contrary is established; they may be avoided if they are founded in fraud or are pronounced by a court not having any competent jurisdiction over the cause, and this is the American doctrine.<sup>1</sup> In England, foreign judgments are treated as judgments of courts of record, in so far, that they are not examinable upon the merits,<sup>2</sup> except under peculiar circumstances. Their courts do not recognize as conclusive the judgment of a foreign court which has been fraudulently obtained. On such a judgment a plea of fraud is

Ricardo v. Garcias, 12 Cl & F. 368; Bank v. Nias, 16 Q. B. 117; Taylor v. Boyden, 8 Johns. 173; Monroe v. Douglas, 4 Sand Ch. 126; Cummings v. Banks, 2 Barb. 601; Bank v. Harding, 9 C. B. 661; Martin v. Nichols, 3 Sim. 458; Schibby v. Westenholz, L. R. 6 Q. B. 155; Warren v. Kingsmill, 8 U. C. Q. B. 407; Bivin v. Belcher, 23 U. C. Q. B. 28; Gautier v. Blight, 5 U. C. C. P. 122; Douglas v. Forrest, 4 Bing. 686; Cowan v. Braidwood, 9 Dow. P. C. 27; Valhe v. Dumerque, 4 Exchq. 290; Bischoff v. Wethered, 9 Wall. 182; Bank v. Butman, 29 Me. 19; Vauquelin v. Bonard, 15 C. B. N. S. 341; Scott v. Pilkington, 2 B. & S. 11; Dowles v. Orr, 1 Y. & C. 464; Brissac v. Rathbone, 6 H. & N. 301; Smith v. Nichols, 5 Bing. N. C. 208; Innis v. Castrique, 8 C. B. N. S. 405; Plummer v. Woodbourne, 4 B. & C. 625; Becquet v. McCarthy, 2 B. & A. 951; Alvon v. Furnival, 1 C. M. & R. 277; Burnham v. Webster, 1 W. & M. 172; Foster v. Glazener, 27 Ala. 391.

<sup>1</sup> Phillips v. Hunter, 2 H. Bl. 410; Sinclair v. Frazer, Dougl. 5; Houlditch v. Donegal, 8 Bligh N. S. 301; Hall

v. Odber, 11 East, 124.

<sup>2</sup> Galbraith v. Neville, 1 Doug. 5; Tarleton v. Tarleton, 4 M. & S. 29; Boucher v. Lawrence, Cas. T. 1161 85; Burroughs v. Sumner, Mass. 1; Gold v. Canham, Cas. in Ch. 311; Martin v. Nichols, 3 Sum. 458; Ferguson v. Mahon, 11 A. & E. 179; Henderson v. Henderson, 6 Q. B. 288; Bank v. Nias, 16 Q. B. 717; Bank v. Harding, 9 C. B. 661; Crawley v. Isaacs, 16 L. T. N. S. 529; Robinson v. Struth, 5 Q. B. 911; Hamilton v. Dutch, & Co., 8 Bro. P. C. 264; Bequet v. MarCarthy, 2 B. & A. 951; Burrows v. Jemino, 2 Stra. 703; Ricardo v. Garcias, 12 Cl. & F. 368; Cammell v. Sewell, 3 H. & N. 617; S. C., 5 H. & N. 728; Kelsall v. Marshall, 1 C. B. N. S. 241; Nav. Co. v. Guillon, 11 M. & W. 877; Piggot v. Worms, 10 C. B. N. S. 149; Simpson v. Fogo, 1 H. & M. 195; O'Leary v. Bligh, 8 Bing. 335; Gledhill v. Gray, L. R. 6 Q. B. 139.

<sup>3</sup> Smith v. Nichols, 5 Bing. N. C. 208; Bank v. Harding, 9 C. B. 661; Bank v. Nias, 16 Q. B. 717; Kelsall v. Marshall, 1 C. B. N. S. 241; Castrique v. Behrens, 30 N. J. L. Q. B. 163; Remiers v. Druice, 23 Beav. 149.

a good plea. But it must have been on the part of the defendant, and must have been committed before the commission of the crime; if committed prior to the commission of the crime, it is not sufficient.<sup>1</sup>

§ 441. The rule as to foreign judgments rests upon considerations of comity, and though treated by our courts, in respect to their conclusiveness, as entitled to the same weight as judgments of our own country, (yet no authority has been furnished holding that a foreign judgment) to the same extent as a domestic judgment, extinguishes the contract debt. On the other hand, it has been decided, in a number of well considered adjudications, that the original debt is not merged, and that the judgment may be used as evidence, not only by the plaintiff or defendant, without a formal allegation in the pleadings. "There is some uncertainty concerning some of the effects of a foreign judgment. But there is none as to its partial effect. It does not operate as a merger of the original cause of action. The fact that assumpsit lies on a foreign judgment is conclusive that the demand has not passed into a security of a legal nature, so as to operate as a technical merger."<sup>2</sup> And when it becomes necessary to enforce them in England, the plaintiff has his option to resort to the original cause of action, or to bring suit on the judgment. But if it settles the whole controversy between the parties it ought to be held conclusive.

§ 406. There has been some considerable diversity of judicial opinion as to the effect of a foreign judgment. While there is but one opinion that any judgment may be impeached for want of jurisdiction of the court over the parties or the subject matter, whenever there is jurisdiction the judgment is as conclusive on

181. *W. v. W.*, 1 Y. & C. Exch.  
 182. *W. v. W.*, 3 Sim. 279.  
 183. *W. v. W.*, 15 Q. B. 117. *Boomer v. B.*, 3 B. & F. 119. *W. v. W.*,  
 15 Q. B. 117. *W. v. W.*, 15 Q. B. 117.  
 184. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
 15 Q. B. 117. *W. v. W.*, 15 Q. B. 117.  
 185. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
 15 Q. B. 117. *W. v. W.*, 15 Q. B. 117.  
 186. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
 15 Q. B. 117. *W. v. W.*, 15 Q. B. 117.  
 187. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
 15 Q. B. 117. *W. v. W.*, 15 Q. B. 117.  
 188. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
 15 Q. B. 117. *W. v. W.*, 15 Q. B. 117.  
 189. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
 15 Q. B. 117. *W. v. W.*, 15 Q. B. 117.  
 190. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
 15 Q. B. 117. *W. v. W.*, 15 Q. B. 117.  
 191. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
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 192. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
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 193. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
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 194. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
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 195. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
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 196. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
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 197. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
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 198. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
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 199. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
 15 Q. B. 117. *W. v. W.*, 15 Q. B. 117.  
 200. *W. v. W.*, 15 Q. B. 117. *W. v. W.*,  
 15 Q. B. 117. *W. v. W.*, 15 Q. B. 117.

\* Hall v. Odber, 11 East, 118; Bank v. Harding, 9 C. B. 661; Smith v. Nichol, 5 Bing. N. C. 208; Kelsall v. Marshall 1 C. B. (N. S.) 241; Harris v. Sanders, 4 B. & C. 411; Castrique v. Behrens, 30 L. J. Q. B. 163; Phillips v. Hunter, 2 H. Bl. 410; Robertson v. Smith, 5 Q. B. 941; Plummer v. Woodburne, 4 B. & C. 625; Osceini v. Bligh, 8 Bing. 325.

the merits as domestic judgments, and cannot be assailed by any defense that would have been admissible in the original foreign action.<sup>1</sup> It was stated in one case, that several pleas were pleaded to show that justice had not been done the defendant in the foreign action. This is never to be presumed, but the contrary principle holds, unless we see in the clearest light that the foreign law or at least some part of the proceedings of the foreign court are repugnant to natural justice, and this has often been made the subject of inquiry in our courts. But it steers clear of the inquiry into the merits of the case upon the facts found; for *whatever constituted a defense in that court ought to have been pleaded there.*<sup>2</sup> Were it otherwise, the parties in such law action could then try the case on new facts and new laws; and even keeping out of view that in independent sovereignties distinct systems of law prevail, it is probable that in many cases opposite results would be reached, even on the same legal basis. A domestic court, for instance, in a particular action decides an issue for the plaintiff, in face of a foreign judgment to the contrary. Either the defendant's property or person subsequently coming into the defendant's court, the defendant sues the plaintiff on the same cause of action and there recovers; and so on as long as either party has anything in the other country which could be attached. In this view, just so far as the principle is applied, is business intercourse between the countries suspended, and the shock is one that affects the subject equally with the foreigner. Each suffers equally from the failure to recognize as authoritative the judicial action of a foreign state. The only safe course is to fall back on what is one of the fundamental maxims of the Roman Law: "*Res judicata pro veritate accipitur.*" It is no bar to an action on a judgment *in personam* of a foreign court having jurisdiction over the parties and cause, that the foreign

<sup>1</sup> *Castrique v. Imrie*, 4 H. L. Cas. 414; *Simpson v. Fogo*, 1 J. & H. 18; *Bank v. Nias*, 16 Q. B. 717; *Bank v. Harding*, 9 C. B. 661; *Goddard v. Gray*, L. R. 6 Q. B. 139; *Henderson v. Henderson*, 6 Q. B. 288; *Scott v. Pilkington*, 2 B. & S. 11; *Vanquelin*

*v. Bound*, 15 C. B. N. S. 341; *Imrie v. Castrique*, 8 C. B. (N. S.) 406; *Rankin v. Goddard*, 54 Me. 28; *Walton v. Sugg*, Phill. (N. C.) 98; *Brissac v. Rathbone*, 6 H. & N. 301; *Lazier v. Westcott*, 26 N. Y. 146.

<sup>2</sup> *Henderson v. Henderson*, 6 Q. B. 298.

tribunal has put an erroneous construction on a foreign contract. The question arose in an action on a judgment of a French court having jurisdiction of the matter, to which there was a plea setting aside the judgment from which it appeared that the action was commenced by the shipowner of a charter-party, made in England, in which was a clause:—"Penalty for the non-performance of the agreement, estimated amount of freight," and that the court had treated this clause (contrary to English law) as fixing the amount of damages recoverable, and had given judgment accordingly for the amount of the freight. The record showed that both parties had appeared and been heard before the judge, and that no objection was made by the defendant to the mode of assessing damages. It was held that the error of the court could not set up as an excuse for not paying the debt incurred by such foreign judgment, having jurisdiction over the matter and the cause, that the judgment proceeded on a misapprehension of the English law, which was really a question of fact, and that it was no defence that the error appeared on the face of the proceedings. For the reason that the French court had misapprehended the English law by evidence; and the court in England having neglected to bring the English law to the notice of the French court, could not impeach the judgment rendered against him on the ground of error as to that law. In addition to the defence of want of jurisdiction, a foreign judgment may be contested on ground of fraud in its execution, or on grounds of defectiveness in its terms,<sup>1</sup> or gross irregularity of process, as where one of the parties was judge,<sup>2</sup> or for technical error of legal matter or for any violation in the process,<sup>3</sup> or for any breach of international law.<sup>4</sup>

The Court of Queen's Bench, in a question on a foreign judgment, said:—"Now in this we think some things are quite clear as principles. If the defendants had been at the time of the

<sup>1</sup> *Goodwin v. Gray*, 6 L. R. Q. B. 139; *Stability v. Macdonald*, L. R. 6 Q. B. 165; *Croft v. Mark*, L. R. 4 H. L. 414.

<sup>2</sup> *Wood v. Watkinson*, 17 Conn. 500; *Welch v. Sykes*, 8 Ill. 197.

<sup>3</sup> *Obicini v. Bligh*, 8 Bing. 335.

<sup>4</sup> *Price v. Dewhurst*, 8 Sim. 270.

<sup>5</sup> *Richard v. Garcia*, 12 Cl. & F. 266; *Burnham v. Webster*, 1 W. & M. 172.

<sup>6</sup> *Shaw v. Gould*, 3 H. L. Cas. 55; *Bank v. Nias*, 16 Q. R. 717.

judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. . . . Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him."<sup>1</sup>

§ 496. The general doctrine maintained by American courts is, that when a foreign judgment comes incidentally in question, as where it is the foundation of a right or title derived under it, and the like, it is conclusive.<sup>2</sup> They are considered as simple contract debts, and the limitations of actions thereon are the same.<sup>3</sup> They do not merge the original cause of action, and cannot be pleaded in bar of an action founded thereon.<sup>4</sup> There can be but little doubt but that payments made, powers exercised, or sales effected, or other final acts accomplished, under the direction of a foreign tribunal, may be valid, when the decree under which they take place is erroneous or even void. Thus, a payment by a garni-see, in obedience to an order of the court, by which he has been attached, will be a bar in any subsequent suit against him for the debt, whether the proceedings took place in a domestic or foreign tribunal; whether they were or were not conclusive as regards other parties to the action, for the simple reason that a payment made in good faith and by compulsion of law exonerates the person who makes it from all further responsibility, and remits those entitled to the fund to an action against the person by whom it has been

<sup>1</sup> *Schibsby v. Westenholz*, L. R. 6 Q. B. 161.

<sup>2</sup> *Bartlett v. Knight*, 1 Mass. 400; *Buttrick v. Allen*, 8 Mass. 273; *Bissell v. Briggs*, 9 Mass. 462, *Stevens v. Gaylord*, 11 Mass. 256; *Jordan v. Robinson*, 3 Shepl. 137; *Pelton v. Platner*, 13 Ohio, 209; *Cummings v. Banks*, 2

*Barb.* 602; *Bank v. Beebee*, 53 Vt. 177, S. C., 38 Am. R. 665.

<sup>3</sup> *Barber v. Lamb*, 8 C. B. N. S. 95, *Hall v. Condiey*, 5 Johns. 132.

<sup>4</sup> *Lyman v. Brown*, 2 Curt. C. C. 559, *Bank v. Beebee*, 53 Vt. 177; S. C., 38 Am. R. 665.

received.<sup>1</sup> Whenever a foreign judgment comes *incidentally* in question it is as conclusive as where it is used as the foundation of a suit decided under it, or to show that the subject-matter of the suit has been passed *in rem judicatum*, or is introduced by a grantor or as a defense, in order to show that his principal was not liable, or is relied on by the garnishee in a foreign attachment for the purpose of protecting himself against the claims of his original creditors, or by the underwriter, in a policy of insurance, to show a breach of warranty on the part of the insured, or an action upon the policy, or by a party to justify himself in a suit done by virtue of it. But whenever a judgment is rendered without jurisdiction it is void, and is treated as a nullity, whether it comes directly or collaterally in question.<sup>2</sup> But a foreign judgment will not be an estoppel in this country, if it does not appear to be final and conclusive as an estoppel in the country where it was pronounced.<sup>3</sup> Lord Ellenborough said that it might be embarrassing injustice on the face of a foreign judgment, or it might have a vice rendering it so ludicrous that it would not raise an assumption, and if submitted to the courts of this country could not be enforced. In another case, the Vice-Chancellor said: "Whenever it is manifest that justice has been disregarded, and that the parties are merely making use of the foreign proceedings as a matter of form, for the purpose of doing that which is contrary to all notions of justice, namely, of deciding in their own favor, the court is bound to treat the proceedings as a matter of no value or substance;"<sup>4</sup> and a judgment rendered against a defendant who, it appears, has not been served with process, or had any notice of the suit, or has been a party-defendant, nor had any opportunity of defending himself, such a judgment would not be enforced by any court.<sup>5</sup>

§ 47. A decree of a court of chancery in England, dismissing a bill filed by an administrator against an executor, is no bar to a subsequent suit in the United States, between the same parties upon the same title with respect to American assets.<sup>6</sup> Lord Kames in

<sup>1</sup> *Hitch v. Briggs*, 9 Mass. 462, 463.  
<sup>2</sup> *Taylor v. Phillips*, 1 H. & G. 493.

<sup>3</sup> *Plummer v. Woodburne*, 4 B. & C. 825, *Smith v. Nichols*, 5 Bng. N. C. 241.

<sup>4</sup> *Buchanan v. Rucker*, 9 East, 192.

<sup>5</sup> *Price v. Dewhurst*, 8 Sim. 279.

<sup>6</sup> *Bischoff v. Wethered*, 9 Wall. 1812.

<sup>7</sup> *Apsden v. Nixon*, 4 How. 467.

his work on equity says: "A foreign decree, which, by dismissing the claim, affords an *exceptio rei judicata* against it, enjoys a more extensive privilege. We not only presume it to be just, but will not admit of any evidence of its being unjust. A decree dismissing a claim, may, it is true, be unjust, as well as a decree sustaining it. But they differ widely in one capital point: in declining to give redress against a decree dismissing a claim, the court is not guilty of authorizing injustice: even supposing the decree to be unjust, the utmost that can be said is that the court forbears to interpose in behalf of justice. But such forbearance, instead of being faulty, is highly meritorious in every case where private justice clashes with public utility. The case is very different with respect to a decree sustaining the claim; for to award execution upon a foreign decree, without admitting any objection against it, would be, for aught the court can know, to support and promote injustice."<sup>1</sup> So, a judgment of an English court, dismissing a bill in equity for an injunction, to prevent the defendant from using the term, "Worcestershire Sance," as a trade-mark, is a bar to a like bill by the same plaintiff against an agent of the same defendant in this country.<sup>2</sup> But where a court of a foreign country, in which a person died domiciled, decides that A. was entitled to inherit the deceased person's property, the probate court in England was held bound by the judgment as to the *status* of A., in allowing him to contest a will made by the deceased, disposing of property in England.<sup>3</sup>

§ 498. Whenever a court has jurisdiction of the subject matter and of the parties, it is a settled rule of law that it may proceed to adjudge the matters in controversy between the parties, and render a judgment which, until reversed by an appellate court, is conclusive upon the parties and their privies. There is also another rule of law that is unquestioned—that a judgment merges the cause of action, and that no action can thereafter be brought upon the same cause, but it must be upon the judgment. Under these rules there can be no reason why a judgment between the parties by a court of competent jurisdiction rendered in a foreign country should not have the same force and effect. There

<sup>1</sup> Kames Eq. 365.

<sup>2</sup> *Doullion v. Crispin*, L. R. 1 H

<sup>3</sup> *Lea v. Deakin*, 11 Biss. 23.

L. C. 301.

is every way, in which such judgment should be received as conclusive. It may be stated that the rule upon process is not a foreign judgment, if the court had jurisdiction of the subject-matter, and the parties were regularly brought before it, and it is so considered in the original cause of action.<sup>1</sup>

400. An alienation of the title to land by a tribunal authorized by the legislative authority of the State where the land is situated, is received in the nature of the action beyond the reach of review by foreign tribunals when originally pronounced, and it is not so, though the land be turned into money, and the proceeds taken within the jurisdiction of the court of another country.<sup>2</sup> No judicial decision can be valid unless the court has the authority necessary for the determination of the case. Parties are subject to the authority of the court. The court gets its foreign judgments are founded solely upon the principle of comity to those principles of natural justice, which that comity has its origin.<sup>3</sup> A party is not to be *in personam* in one sovereignty may always be enforced in another by showing that the party was not amenable to the authority of the court, if he was the court did not take the proper steps to exercise its authority over him, as by the service of process or giving him notice of the pendency of the action, and the necessity of coming forward to answer the claim.

A court may defeat the effect of a foreign judgment by refusing to put it in the court from which it proceeds, or it may be admitted without issuing process, and yet not be enforced, or served with, or had notice, or otherwise, or any process at the suit of the plaintiff for the enforcement upon which the judgment was recovered, and that the defendant appeared thereto; for the common justice of

<sup>1</sup> *Harley v. Bland*, 41a Am. 374.  
*Harley v. West*, 26 N. Y. 152.  
*Harley v. Johnson*, 37 Id. Ann. 37.  
*McIntosh v. Avery*, 10 Vt. 328.  
*Harley v. Bland*, 12 Ct. & F. 368.  
*Bank v. New*, 13 Q. B. 717. *Henderson v. Henderson*, 6 Q. B. 298, *Henderson v. Bruce*, 29 B. & W. 149, *Vancouver v. Bonard*, 15 C. B. N. S. 341;

*Scott v. Pilkington*, 3 B. & S. 11;  
*Bank v. Harding*, 5 Ohio, 345; *Cas-  
 traque v. Irie*, L. R. 4 H. L. 444;  
*Bank v. Harding*, 9 C. B. 661.

<sup>2</sup> Story's Conflict Laws, § 463.

<sup>3</sup> *Monroe v. Douglass*, 4 Sand. Ch. 126.

<sup>4</sup> *Moulin v. Ins. Co.*, 24 N. J. L. 222.

all nations requires that no condemnation should be pronounced behind the back of a man, who has had no opportunity to appear and defend his interest, either personally or by his proper representatives."<sup>1</sup>

Foster, J., refers to a very old precedent in support of this doctrine,<sup>2</sup> "I have heard it observed by a very learned man," say he, "that even God, himself, did not pass sentence upon Adam before he was called upon to make his defense. 'Adamo,' says God, 'where art thou? Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve, also." The above passage, though somewhat irreverent, appears to be in favor with the judges. It was cited with approbation by Maule, J.,<sup>3</sup> and by Ryles, J.<sup>4</sup>

<sup>1</sup> *Ferguson v. Mahon*, 11 Adol. & El. 179; *Buchanan v. Rucker*, 1 Camp. 63; *Cavan v. Stewart*, 1 Stark. 525; *Houlditch v. Donegal*, 8 Bligh (N. S.) 338; *Rex v. Abp. of Canterbury*, 28 L. J. Q. B. 154; *Vallée v. Dumerque*, 4 Exch. 290; *Brook, in re*, 16 C. B. (N. S.) 403; *Sawyer v. Ins. Co.*, 12 Mass. 291; *Bradstreet v. Ins. Co.*, 3 Sumn. 600; *Magoun v. Ins. Co.*, 1 Story, 157; *Rangeley v. Webster*, 11 N. H. 299; *Wernwar v. Pawling*, 5 G. & J. 500; *Bissell v. Briggs*, 9 Mass. 462; *Commonwealth v. Breen*, 17 Mass. 515; *Woodward v. Tremere*, 6 Pick. 351; *Hall v. Williams*, 6 Pick. 232; *Shumway v. Stillman*, 4 Cowen, 292; *Holt v. Alloway*, 2 Blackf. 108; *Field v. Gibbs*, Peters C. C. 155; *Lincoln v. Tower*, 2 McLean, 473; *Gleason v. Doid*, 4 Mete. 333; *Steel v. Smith*, 7 W. & S. 417; *Davis v. Connelly*, 4 B. Mon. 136; *Bank v. Butman*, 29 Me. 19; *Kittridge v. Emmer-son*, 15 N. H. 227; *Moulin v. Ins. Co.*, 24 N. J. L. 222; *Smith v. Smith*, 17 Ill. 482; *Rae v. Hulbert*, 17 Ill. 572; *Black v. Black*, 4 Bradf. 174; *Judkins v. Union Co.*, 37 N. H. 470; *Rape v. Heaton*, 9 Wis. 328; *Braswell v. Downs*, 11 Florida. 62; *Folger v. Ins.*

*Co.*, 99 Mass. 267. Post, Judgments of other States. *Aldrich v. Kinney*, 4 Conn. 389; *Denion v. Hyde*, 6 Conn. 508; *Fenton v. Gallick*, 8 Johns. 199; *Shumway v. Stillman*, 6 Wend. 147; *Fullerton v. Horton*, 11 Vt. 475; *Watson v. Bank*, 4 Mete. 343; *Pritchett v. Pope*, 3 Ala. 552; *Bambers v. Dawson*, 4 Ill. 536; *Welch v. Sykes*, 8 Ill. 197; *Wilson v. Jackson*, 10 Mo. 529; *Thompson v. Emmert*, 15 Ill. 415; *Rogers v. Rogers*, 15 B. Mon. 364; *Bissell v. Wheelock*, 11 Cuth. 277; *Hindman v. Muckell*, 3 Ia. 170; *Dolan v. Whitney*, 3 Ind. 146; *Norwood v. Cobb*, 15 Tex. 500; *Kane v. Cook*, 8 Cal. 419; *Carlton v. Beckford*, 13 Gray, 591; *Batzell v. Nester*, 1 Ia. 588; *Norwood v. Cobb*, 24 Tex. 554; *Warren v. McCarthy*, 25 Ia. 95; *San v. Frank*, 25 Ill. 125; *Lewiston v. Jarvis*, 32 Ill. 304; *Poland v. B. L. win*, 22 Ia. 228; *Burnham v. Webster*, 1 W. & M. 178.

<sup>2</sup> *Bentley's Case*, *Fortesque*, 202 1 Str. 557; *Andr.* 176, 2 Ld. Raym. 1334.

<sup>3</sup> *Abbey v. Dale*, 10 Com. B. 62.

<sup>4</sup> *Cooper v. Bd. of Works*, 14 Com. B. (N. S.) 195.

§ 500. In regard to marriages, the general principle is, that between persons *sojourners*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is invalid everywhere.<sup>1</sup> The most prominent, if not the only known exceptions to this rule, are marriages involving polygamy and incest; those prohibited by the public law of a country from motives of policy; and those celebrated in foreign countries by subjects entitling themselves, under special circumstances, to the benefit of the laws of their own country.<sup>2</sup> As to sentences confirming marriages, some English jurists seem disposed to concur with those of Scotland and America, in giving to them the same conclusiveness, force and effect. If it were not so, as Lord Hardwicke observed, the rights of mankind would be very precarious. But others, conceding that a judgment of a third country, on the validity of a marriage not within its territories, nor had between subjects of that country, would be entitled to credit and attention, deny that it would be universally binding.<sup>3</sup>

§ 501. The first section of the fourth article of the constitution of the United States declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." "The language," says Mr. Justice Story,<sup>4</sup> "is positive and declaratory and imports that it is intended to give them a more conclusive efficiency than foreign judgments of tribunals outside of the United States, and that they shall be as conclusive as domestic judgments. If the jurisdiction of the court be established, the judgment shall be conclusive as to its merits. By the long established rules of common law, both in England and America, foreign judgments were *prima facie* evidence of their own correctness. They might be impugned for their injustice or irregularity; but they were admitted to be

<sup>1</sup> Story's Conf. Laws, § 499, 504, 504; *Morrell v. Dickey*, 1 John. Ch. 153; *Kraft v. Wickey*, 4 G. & J. 331; *Dixon v. Ramsay*, 3 Cranch, 319.

<sup>2</sup> Story's Conf. Laws, §§ 50, 51, 113.

<sup>3</sup> *Roach v. Garvan*, 1 Ves. Sr. 157; Story's Conf. Laws, §§ 595, 596; *Sinclair v. Sinclair*, 1 Hagg. Consist. R. 294; *Scrimshire v. Scrimshire*, 2 Hagg. Consist. R. 395.

<sup>4</sup> Story's Commentaries on the Constitution, §§ 1297-1307.

a good ground of action here, and stood firm until impeached and overthrown by competent evidence, introduced by the adverse party. It is hardly conceivable, that so much solicitude should have been exhibited to introduce, as between contended states, much less between states united under the same national government, a clause nearly affirmative of an established rule of law, and not denied to the humblest or most distant foreign nation. It was hardly supposable, that the states would deal less favorably with each other on such a subject, where they could not but have a common interest, than with foreigners. A motive of a higher kind must have directed them to the provision. It must have been "to form a more perfect union," and to give to each state a higher security and confidence in the others, by attributing a superior sanctity and conclusiveness to the public acts and judicial proceedings in all. There could be no objection to such a course—but many reasons in its favor. The states were united in an indissoluble bond with each other. The commercial and other intercourse with each other would be consistent and infinitively diversified. Credit would be everywhere given and received, and rights and property would belong to citizens of every state, in many other states than that in which they resided. Under such circumstances it could scarcely consist with the peace of society, or with the interest and security of individuals, with the public or with private good; that questions and titles, once deliberately tried in one state, should be open to litigation again and again, as often as either of the parties or their privies, should remove from one jurisdiction to another. It would occasion infinite injustice, after such trial and decision again to open and re-examine all the merits of the case. It might be done at a distance from the original place of the transaction, after the removal or death of the witness, or the loss of other testimony; after a long lapse of time, and under circumstances wholly unfavorable to a just understanding of the case.

§ 502. "It might be said, that the judgment was unjust upon the merits, or erroneous in point of law. If this was true, it would furnish no ground for interference; for the evils of a new trial would be greater than the cure. Every such judgment ought to be presumed to be correct, and founded on justice. And what security is there, that the new judgment, upon the re-exami

ation, would be more just, or more conformable to the law, than the first. What state has a right to proclaim that the judgments of its own courts are better founded in law and justice than those of any other state? The evils of introducing a general system of re-examination of the judicial proceedings of other states, whose constitution are so intimate, and whose rights are so interwoven with our own, would far outweigh any supposable benefits from an imagined superior justice in a few cases. Such must have been the motives of the framers of the Constitution of the United States. They not only intended to give faith and credit to the judicial records and judicial proceedings of each of the states, such as belong to those of foreign nations and tribunals, but to give them in a faith and credit, that is, to attribute to them *past and absolute verity*, so that they cannot be contradicted, or the truth of them be denied, any more than in the state where they originated. The act of May 26th, 1790, ch. 39, has declared that the civil record and judicial proceedings authenticated as by the act provided shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from whence such records are or shall be taken, so that when such records are authenticated as the law provides, it gives them the same faith and credit as they have in the state from which they are taken. If a judgment is conclusive in the state where it is pronounced, it is equally conclusive every where. If re-examinable there, it is open to the same inquiries in every other state. It is therefore put on the footing of a domestic judgment. *But this does not prevent an inquiry into the jurisdiction of the court, in which the original judgment was given, to pronounce it, or the right of the state itself to exercise authority over the person or subject matter.* Whatever plea would be good to a suit thereon in the state where rendered, and none other, can be pleaded in any other court in a sister state or of the United States.\*

\* *Haupt v. McConnell*, 3 Wheat. 234; *Bank v. Whicker*, 28 Conn. 423; *Davall v. Pearson*, 18 Md 502; *Sage v. Harpending*, 40 Barb 166; *Harris v. Hammond*, 18 How. P. 123; *Rathbone v. Morris*, 9 Abb. P. 213; *Mills v. Dur-*

*ye*, 7 Cranch, 481; *McElmoyle v. Cohen*, 13 Pet. 312; *Jacquette v. Huguenon*, 2 McL. 129; *Arndt v. Arndt*, 15 Ohio, 33; *French v. Pease*, 10 Kas. 51; *Palne v. Schenectady*, 12 R. L. 440.

§ 503. By the constitution and laws of the Congress of the United States, the judicial determinations, such as judgments, sentences, and decrees of the various sister States of the United States, are invested with same force and effect in every other State as they have in that in which they are rendered, and they not only operate by way of estoppel,<sup>1</sup> but by way of merger to suits brought upon the original cause of action, but they must be declared on in debt as obligation of record, and not in assumption.<sup>2</sup> They have all the presumptions in their favor which exist and are accorded in the case of domestic judgments, and are absolutely conclusive of the facts and the law, unless it is shown that the tribunal in which they were rendered exceeded its powers in taking cognizance of the cause, or that the parties were not subject to the jurisdiction of the court, and a judgment may be impeached in another State by showing that the tribunal lacked the necessary jurisdiction to render it, or that the notice which natural justice and the principles of jurisprudence require, were not extended or given to the defendant; and the want of notice may not only be shown by proof *aliunde*, when the record is silent as to that matter, but in opposition and contradiction to its averment.

§ 504. A judgment of a State court has the same conclusive effect, though the suit was commenced by attachment, if the

<sup>1</sup> Const. Art 3, § 4; Act of Cong. 1790, ch. 11; Phillips v. Godfrey, 7 Bosw. 150; Rogers v. Rogers, 15 B. Mon. 355; McFarland v. White, 13 La. Ann. 384; Mills v. Duryee, 7 Cranch, 481; Hampton v. McConnell, 3 Wheat. 244; McElmoyle v. Cohen, 13 Pet. 312; Borden v. Fitch, 15 Johns. 121; Andrews v. Montgomery, 19 Johns. 162; Randolph v. Keeler, 21 Mo. 577; Evans v. Justine, 6 Ohio, 117; Burns v. Belknap, 22 Vt. 419; Fullerton v. Horton, 11 Vt. 425; Hoxie v. Wright, 2 Vt. 269; Davis v. Connelly, 4 B. Mon. 136; Hensly v. Force, 12 Ark. 756; Buchanan v. Port, 5 Ind. 264; McJilton v. Love, 13 Ill. 436; Sharman v. Morton, 31 Ga. 4; Butcher v. Bank, 2 Kas. 70; Thomp-

son v. Emmert, 15 Ill. 415; Lawrence v. Jarvis, 32 Ill. 394; Duvall v. Pearson, 18 Md. 502; Pritchell v. Clark, 3 Harr. 241; Armstrong v. Carson, 2 Dall. 303; Hopkins v. Lee, 6 Wheat. 109; Shumway v. Stillman, 4 Cox. 293; Mayhew v. Thacher, 6 Wheat. 129.

<sup>2</sup> Cannon v. Blane, 15 Ala. 262; Blodgett v. Jordan, 6 Vt. 580; Spencer v. Reekway, 1 Ohio 250; Cherry v. Speight, 28 Tex. 503; Wormsley v. Pawling, 5 G. & J. 500; R. R. Co. v. Winne, 14 Ind. 385; Baker v. Rand, 13 Barb. 152; Taylor v. Dryden, 8 Johns. 173.

<sup>3</sup> Benton v. Burgot, 10 S. & R. 240; Ins. Co. v. Dewolf, 33 Pa. St. 43.

defendant appeared and took part in the defense.<sup>1</sup> So, if a corporation, chartered in one State, is allowed to transact business in another, on condition that service of process on its agent shall be deemed service upon the corporation itself; a judgment thus obtained is entitled to the same faith and credit in the former State as in the latter.<sup>2</sup> But it has the force and effect of a domestic judgment in another State, only so far that it estops all inquiry into the subject matter, subject to the qualification that they are open to inquiry as to the jurisdiction of the court which rendered them, as to notice to the defendant. The judgment of a State court, not reversed by a superior court having jurisdiction, nor set aside by a direct proceeding in chancery, is conclusive in all the courts of the other States, where the subject matter of the controversy is the same.<sup>3</sup>

§ 505. The Supreme Court of the United States, upon the question of the conclusiveness of judgments of other States, said: Article four, section one, of the Constitution, provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such records shall be proved, and the effect thereof." Congress has exercised that power, and in effect provided that the judicial records in one State shall be proved in the tribunals of another, by the attestation of the clerk under the seal of the court, with the certificate of the judge that the attestation is in due form. That such records, so authenticated, "shall have such faith and credit given to them in every court in the United States as they have by law or usage in the courts of the State

<sup>1</sup> *Hatch v. Polger*, 20 Wall. 7; *Maroon v. Seales*, 9 Wall. 31; *Christmas v. Bross*, 3, 5 Wall. 299; *Pinner v. U. S.*, 11 How. 103; *U. S. v. Yates*, 6 How. 605; *Harris v. Hardman*, 14 How. 334; *Toland v. Sprague*, 12 Pet. 300; *Chaffee v. Hayward*, 20 How. 208; *McDonough v. Millandon*, 3 How. 633; *Comm Bank v. Stoughton*, 14 Pet. 60; *Eldred v. Bask*, 17 Wall. 551.

<sup>2</sup> *Ins. Co. v. French*, 18 How. 404.

<sup>3</sup> *Christmas v. Russell*, 5 Wall. 291; *Rogers v. Odell*, 39 N. H. 472; *Moulin v. Ins. Co.*, 24 N. J. L. 222; *Armory v. Armory*, 3 Biss. 296; *Campbell v. Ins. Co.*, 1 So. C. 158; *Barney v. White*, 44 Mo. 137; *Zimmerman v. Hessler*, 32 Md. 274; *Chew v. Brummagin*, 21 N. J. Eq. 520; *McLaren v. Kerler*, 23 La. Ann. 80; *Simmons v. Clark*, 56 Ill. 96; *French v. Pense*, 10 Kas. 51; *Clemmer v. Cooker*, 24 Ia. 185; *Street v. Brockley*, 53 Me. 346.



§ 466. There has been considerable conflict in the various states as to the effect of a judgment rendered in one state, when such judgment or record is made the basis of an action in another state. A large number of cases can be found in which this question has been determined which are utterly irreconcilable. The Supreme Court of the United States—the final arbiter on all questions where some question of acts of Congress or the constitution of the United States are involved,—has always inclined to the doctrine that such judgments, when sued upon in other states might be questioned upon the ground of want of jurisdiction over the party against whom the record is sought to be made available. It was so held in the case of *Thompson v. Whitman*<sup>1</sup> was decided by majority, but the question was fairly raised or definitely settled, although in an early case the same court said: "The jurisdiction of every court over a subject may be inquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings" and "the rule prevails whether such record or judgment has been given in a court of admiralty, civil, equity, or patent court, or court of common law, or whether the point relied has arisen under the laws of nations, the practice in admiralty, or the municipal laws of States."<sup>2</sup>

§ 467. The doctrine of the court is based on the following ground: 1. Article IV, section 1, of the constitution of the United States provides that, "full faith and credit shall be given in every state to the public acts, records, and judicial proceedings of every other state; and the Congress may, by general laws, prescribe the manner in which such acts and proceedings shall be proved, and the effect thereof." Under the power thus conferred, Congress passed the act of May 26, 1790, which provided that "the records and judicial proceedings of the courts of any state

*Blackway*, 1 Ohio, 260; *Martin v. Hanson*, 37 Mo. 321; *Sweet v. Brackley*, 30 Mo. 236; *Melton v. Lee*, 18 Ill. 236; *Hutton v. Fisher*, 41 Ill. 32; *Raven v. Cuyler*, 24 Ill. 357; *Hankin v. Barnes*, 5 Bush, 20; *Weyer v. Lane*, 3 Ohio, 303; *Hoxie v. Wright*, 2 Vt. 269; *Holt v. Alloway*, 2 Blackf. 82;

*Sedman v. Patchin*, 34 Barb. 218; *Giffin v. Eaton*, 27 Ill. 379; *Randolph v. Keeler*, 21 Mo. 557; *Gunn v. Howell*, 35 Ala. 144; *McIntosh v. Greenwood*, 15 Tex. 116.

<sup>1</sup> 18 Wall. 457

<sup>2</sup> *Williams v. Berry*, 8 How. 540.

shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, of the court by which the attestation is in due form. And the said records and proceedings, authenticated as aforesaid, shall have the same faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence said records are or shall be taken."

What acts, records, and judicial proceedings are entitled to full faith and credit, and what is a judgment of a court of a state that imports absolute verity?

By the act of 1790, a judgment which is valid in the state where rendered becomes, in the other states, a debt of record, not re-examinable upon the merits, but it does not carry with it into another state the efficacy of a judgment against person or property that can be enforced by execution. To give it that force in another state, it must by action be made the judgment of such other state.

Hence it follows that in an action on such judgment in another state, whatever pleas would be good in the state where rendered would be good in such other state.<sup>1</sup>

The constitutional provision was not intended to confer a new power of jurisdiction on the courts of any state, but to produce the effect in other states of the acknowledged jurisdiction over persons and things within the state. Every judgment depends, for its force and validity, on the competency and authority of the tribunal which pronounces it, and may be assailable, showing a want or failure of jurisdiction over the subject-matter or the person, even though absolutely conclusive in other particular.

The manifest design of the constitution was to give force and effect to *valid* judgments, and not to enable the courts of one state to exercise a usurped or illegal authority over the citizens of other states of the Union, who are not amenable to the jurisdiction of the tribunal.

Without the constitutional provision and the act of 1790, the judgments of one state would stand in the tribunals of the others, on the same footing as *foreign judgments*, and only be respected

on the principles of equity between nations, and not as a duty imposed by the paramount organic law.

§ 108. As is well known, this provision of the constitution, in connection with this supplemental statute, has been the subject of much consideration by the courts of this country, both State and Federal. Although the views expressed from the bench, in this series of cases, have not been entirely coincident, nevertheless certain results have been reached which now have become well settled rules of law. Among these, plainly, may be placed the proposition that the judgments of other states are not like domestic judgments, conclusive on the point of jurisdiction. When a decision, pronounced *extra territorium*, is put in controversy, it is competent, as a defense, to show that the adjudging tribunal had no jurisdiction over the person or the subject matter. The principle is, that the constitution and the federal act make the judgments only of state courts having the right to take legal cognizance of the case, conclusive of the rights involved, when sued upon in another state. In such a suit, therefore, the question of jurisdiction is always open to inquiry. It was the intention of the constitution of the United States and of the act of Congress, to give to the judicial proceedings of a state, when transferred to another state, that effect which, upon general principles of law and natural justice, such proceedings would be entitled to, within the territory where they originated; that the judgment, if the court rendering it was not possessed of jurisdiction over the case, was void at home, and, consequently, could be invested with no force when sued upon abroad; and that judicial cognizance over the person could not be acquired without the citation of the defendant, he being a non-resident, was such as to afford to him a reasonable opportunity of making defense. Accordingly, pleas to suits on extra-territorial judgments have been repeatedly sustained, which alleged that the defendants were non-residents of the state in which the judgments were rendered; that they were not within such state at any time pending the suit or when the judgment was rendered, and were not served with process, and did not appear to the action. The constitutional right to thus make this defense is well established. The underlying maxim applicable is, that even by express legislation a state cannot give such an efficacy to its own judicial

determinations, that they will have a final effect over the rights adjudged in a foreign forum, as against an absent citizen of another state who was not cited to appear, and whose appearance was not voluntarily entered. And it is well settled by the great weight of authority, that the want of jurisdiction of the court rendering the judgment can be shown by evidence, notwithstanding the recital, in such judgment, of the existence of the controverted facts. To this extent the law on this subject must be considered as entirely settled. The Supreme Court of the United States in many of its decisions had announced similar principles, but it was not until the case of *Thompson v. Whitman*, that this question was squarely presented to, and decided by that court; in the opinion of the court<sup>1</sup> delivered by Mr. Justice Bradley, speaking for the court says: "The opinion of Judge Mury in<sup>2</sup> is frequently cited to show that want of jurisdiction over the defendant, may always be proven. He, in deciding whether such proof should be received against a record made in *another State*, said: 'But it is strenuously contended that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of, and did not appear to the original action, all the State courts, with one exception, agree in opinion that the paper introduced as to him is no record; but if he cannot show, even against the pretended record that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is to my mind little less than sophistry. The plaintiffs in effect declare to the defendant: The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact

<sup>1</sup> 18 Wall. 457.

<sup>2</sup> *Starbuck v. Murray*, 5 Wend. 148.

which the defendant puts in issue is the validity of the record, and yet it is contended that he is estopped by the unimpeachable credit of that very record from disproving any one allegation contained in it. To say that the defendant may show the supposed record to be a nullity by showing a want of jurisdiction in the court which made it, and at the same time to estop him from doing so because the court have inserted in the record an allegation which he offers to prove untrue, does not seem to me to be very consistent. Under the operation of such a rule, a court could always sustain its jurisdiction if it had any solicitude to do so; or rather the party who had the benefit of its decision, and who by the practice of most tribunals, is intrusted with making the record, would not fail to put it beyond the power of his opponent to show a want of jurisdiction."

§ 500. The rule is now well settled that neither the constitutional provision, that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court in which a judgment offered in evidence was rendered, and such a judgment may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist; and this is true either as to the subject-matter or the person, or in proceedings *in rem* as to the thing.<sup>2</sup>

<sup>1</sup> *Starbuck v. Murray*, 5 Wend. 118; *Hall v. Williams*, 6 Pick. 232; *Aldrich v. Kane*, 1 Conn. 280; *Harris v. Hardeman*, 11 How. 336; *Noyes v. Butler*, 6 Barb. 613; *Shelton v. Tiffin*, 6 How. 163; *Newcomb v. Dewey*, 27 Iowa, 381; *Thompson v. Whitman*, 18 Wall. 457.

<sup>2</sup> *Thompson v. Whitman*, 18 Wall. 457; *Harris v. Hardeman*, 11 How. 336; *Borden v. Fitch*, 15 John. 141; *Christmas v. Russell*, 5 Wallace, 290; *Elliot v. Pieroul*, 1 Pet. 323; *U. S. v. Arredondo*, 6 Pet. 631; *Voorhees v. Bank*, 10 Pet. 475; *Moulin v. Insur-*

*ance Co.*, 24 N. J. L. 222; *Mackay v. Gordon*, 34 N. J. L. 286; *Wilson v. Bank*, 6 Leigh, 570; *Spencer v. Bruckway*, 1 Ohio, 261; *Goodrich v. Jenkins*, 6 Ohio, 44; *Anderson v. Anderson*, 8 Ohio, 108; *Paine v. Mooreland*, 15 Ohio, 445; *Hunt v. Hunt*, 72 N. Y. 217; *Kinnier v. Kinnier*, 45 N. Y. 535; *Pennywit v. Foote*, 27 Ohio S. 600, S. C., 22 Am. R. 340; *Jardine v. Reichert*, 39 N. J. L. 165; *Guthrie v. Lowrie*, 84 Pa. St. 533; *Wright v. Andrews*, 130 Mass. 140; *Harvey v. Drew*, 82 Ill. 606; *Ferguson v. Crawford*, 70 N. Y. 253; *Pennoyer v. Neff*,

From the number of cases cited in the note it will be seen that the principle which has been finally settled by the only tribunal in the land having the jurisdiction to construe the provisions of the Federal Constitution and the act of Congress, is no new one. The principle is older than any constitution, or even Magna Charta; in fact it dates back to the time when Adam ate of the forbidden fruit; it was introduced *ab origine mundi*; "for God himself did not pass sentence upon Adam, before he was called upon to make his defense. 'Adam,' says God, 'where art thou? hast thou eaten of the tree whereof I commanded thee thou shouldest not eat?' and the same question was put to Eve."

95 U. S. 714; Kingsbury v. Yniestra, 50 Ala. 320; Eaton v. Hasty, 6 Neb. 419; S. C., 29 Am. R. 365; Kerr v. Kerr, 41 N. Y. 272; Thompson v. Emmert, 15 Ill. 416; Zepp v. Hagar, 70 Ill. 223; Knowles v. Gaslight Co., 19 Wall. 59; McCauley v. Hargroves, 48 Ga. 50; Starbuck v. Murray, 5 Wend. 148; Napton v. Leaton, 71 Mo. 358; Bodurtha v. Goodrich, 3 Gray, 508; McDermott v. Clay, 107 Mass. 501; Marx v. Fore, 51 Mo. 69; S. C., 11 Am. R. 432; Easely v. Clinton, 23 Tex. 288; Finnerin v. Leonard, 7 Allen, 54; Noyes v. Butler, 6 Barb. 613; Lawrence v. Jarvis, 32 Ill. 304; Mackay v. Gordon, 34 N. J. L. 286; Rankin v. Goddard, 54 Me. 28; Carlton v. Bickford, 13 Gray, 596; Bowler v. Huston, 30 Gratt. 266; S. C., 32 Am. R. 673; Gilman v. Gilman, 126 Mass. 26; S. C., 30 Am. R. 616; People v. Dowell, 25 Mich. 247; S. C., 12 Am. R. 260; Shumway v. Stillman, 4 Cow. 202; Bartlett v. Knight, 1 Mass. 408; Shelton v. Tiffin, 6 How. 163; Reed v. Elder, 62 Pa. St. 308; S. C., 1 Am. R. 414; Webster v. Hunter, 50 Iowa, 215; Corby v. Wright, 4 Mo. App. 443; Noble v. Oil Co., 79 Pa. St. 354; Guthrie v. Lowry, 84 Pa. St. 533; Hill v. Mendenhall, 2 Wall. 453; Graham v. Spencer, 14 F. R. 603; Hall v. Laning, 91 U. S. 160; Lowe v. Lowe,

40 Iowa, 220; Hall v. Williams, 6 Pick. 232; Woodward v. Tremere, 6 Pick. 354; Thurler v. Blackburne, 1 N. H. 248; Aldrich v. Kinney, 4 Conn. 180; Holt v. Alloway, 2 Black. 108; Spencer v. Brockway, 1 Ohio 260; Wood v. Wood, 38 Ky. 63; Board v. College, 17 Wall. 521; Eager v. Stoner, 59 Mo. 87; Hoffman v. Hoffmann, 46 N. Y. 30; Clark v. Little, 41 Iowa, 497; Andrews v. Harriott, 4 Cow. 524; D'Arcy v. Ketchum, 11 How. 165; Hickey v. Stewart, 3 How. 762; Bank v. Bank, 1 Gil. 457; Andrews v. Montgomery, 19 Johns. 162; Christmas v. Russell, 5 Wall. 230; Johnson v. Pearce, 12 N. Y. 164; Newell v. Newton, 10 Pick. 472; Morey v. Morey, 27 Minn. 265; O'Rourke v. Ry. Co., 55 Iowa, 332; Wood v. Wood, 78 Ky. 624; Wharton v. Monague, 62 Ala. 201; Webster v. Hunter, 50 Iowa, 215; Gilchrist v. Company, 21 W. Va. 115; Healy v. Root, 11 Pick. 360; Murren v. Mattoon, 13 Pick. 58; Adams v. Roe, 11 Me. 95; Hale v. Williams, 10 Me. 283; Whittier v. Wendell, 7 N. H. 257; Wernwag v. Pauling, 5 G. & J. 500; Hodges v. Doane, 1 Yerg. 125; Rogers v. Coleman, Hard. 413; Rust v. Frothingham, 1 Ill. 259; Miller v. Miller, 1 Bailey, 244; Mitchell v. Ferris, 5 Del. 34; Redus v. Burnett, 59 Tex. 576.

also." This passage, though somewhat irreverent, was cited with approbation in England by the judges who announced the same doctrine as applicable to foreign judgments, and in fact to all judgments: which was pronounced by the Supreme Court of the United States in the Thompson case, in which the following principles have been firmly and finally settled.<sup>1</sup> And the English doctrine is the same.<sup>2</sup>

§ 510. Unless a court has jurisdiction it can never make a record, which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not, therefore, to be estopped by any allegation in that record from proving any fact that goes to establish the truth of the plea, alleging want of jurisdiction. So long as the question of jurisdiction is in issue, the judgment of a court of another State, is in effect *prima facie* evidence, but for all the purposes of sustaining that issue, it is examinable into the same extent as a judgment rendered by a foreign court. If the jurisdiction of the court is not impeached, it has the character of a record, and for all purposes is received with full faith and credit.<sup>3</sup> The rule is the same with any judgment, sentence, or decree. A want of jurisdiction in the court pronouncing it may always be set up, when it is sought to be enforced, or when any benefit is claimed under it, and the principle which ordinarily forbids the impeachment or contradiction of a record has no sort of application to the case.<sup>4</sup>

<sup>1</sup> Ante, §§ 491, 495, 499

<sup>2</sup> *Schubley v. Westenholz*, L. R. 6 Q. B. 175; *Roussillon v. Roussillon*, 14 Ch. Div. 451; *Smith v. Nichols*, 5 Bliz. N. C. 208; *Buchanan v. Rucker*, 9 East, 192.

<sup>3</sup> *Starbuck v. Murray*, 5 Wend. 148; *Borden v. Patch*, 15 Johns. 140; *Pollock v. Wegman*, 13 Wis. 569; *Bloom v. Burdick*, 1 Hill. 130; *Rape v. Hedon*, 9 Wis. 328; *Pendleton v. Wood*, 17 N. Y. 72; *Steen v. Steen*, 25 Miss. 513; *Bank v. Judson*, 8 N. Y. 254; *Edwards v. Toomer*, 22 Miss. 80; *Noyes v. Butler*, 6 Barb. 613; *Fitzhugh v. Custer*, 4 Tex. 399; *Hard v. Shipman*, 6 Barb. 621; *Stallings v.*

*Gulley*, 3 Jones (La.) 245; *Corwin v. Merritt*, 3 Barb. 341; *Elliott v. Piersol*, 1 Pet. 340; *Dobson v. Pearce*, 12 N. Y. 156; *Smith v. Pomeroy*, 2 Dill. 414.

<sup>4</sup> *Buttrick v. Allen*, 8 Mass. 293; *Bissell v. Briggs*, 9 Mass. 462; *Arnott v. Wood*, 1 Dill. 362; *Marx v. Fore*, 51 Mo. 69; *Aldrich v. Kennedy*, 4 Conn. 280; *Mackay v. Gordon*, 34 N. J. L. 286; *U. S. v. Arredondo*, 6 Pet. 691; *Voorhees v. Bank*, 10 Pet. 475; *Wilcox v. Jackson*, 13 Pet. 511; *Shriver v. Lynn*, 2 How. 59; *Hickey v. Stewart*, 3 How. 762; *Williamson v. Berry*, 8 How. 540; *Binford v. Kirkpatrick*, 13 Ark. 33; *Lazier v.*

§ 511. In the United States the rights and powers of guardians are considered as strictly local; and no guardian is admitted to have any right to receive the profits, or to assume the possession of the real estate, or to control the person of his ward, or to maintain any action for the personalty out of the States under whose authority he was appointed, without having received a due appointment from the proper authority of the State within which the property is situated, or the act is to be done, or to whose tribunals resort is to be had. The same rule is also applied to the case of executors and administrators. A lunatic, who by her next friend has recovered judgment in another State, may bring a suit on said judgment by such next friend, and such judgment is conclusive, as to her right to recover in the name and capacity in which she sues.<sup>1</sup> The probate of a will in another State is a judicial proceeding, to the record of which full faith and credit is to be given, when authenticated as required by the act of Congress; and it is not necessary to the admission of such will, with the probate thereof in evidence, that they shall have been recorded in a sister State.<sup>2</sup> Among the numerous cases arising upon judgments of other States, there has been a vast amount of inquiry and argument as to what kind of judgments were included within that article of the Constitution, and the laws of the United States. In Massachusetts it is held to apply to civil actions and not criminal ones.<sup>3</sup> While in North Carolina the direct converse of this was held.<sup>4</sup> In Texas, a judgment rendered in another State against a defendant in his lifetime, is not only sufficient, after his decease, to support an action against his personal representative in that State, but must, if not reversed or annulled, be held conclusive of all matters therein adjudicated unless it be void for fraud.<sup>5</sup> In Iowa, a judgment in a bastardy case, rendered in another State by a court having jurisdiction, may be enforced there, although the subject matter of the action is one

Westcott, 26 N. Y. 146; Phillips v. Godfrey, 7 Bosw. 150; Jarvis v. Sewall, 40 Barb. 449; Sherman v. Morton, 31 Ga. 34.

<sup>1</sup> Cook v. Thornhill, 13 Tex. 293.

<sup>2</sup> Lewis v. St. Louis, 69 Mo. 595; Bradstreet v. Kinsella, 76 Mo. 63; Harris v. Harris, 61 Ind. 117; Dogli-

oni v. Crispin, L. R. 1 H. L. 301.

<sup>3</sup> Commonwealth v. Green, 17 Mass. 514.

<sup>4</sup> State v. Chandler, 3 Hawks 393.

<sup>5</sup> Cherry v. Speight, 28 Tex. 503; See Turley v. Dreyfus, 33 La. Ann. 885.

of merely local police regulation in such other State, so that the original action could not have been brought there. The fact that the judgment was so irregular that it would have been reversed on appeal, is no defense to the action upon it.<sup>1</sup> A judgment of a court of competent jurisdiction in one State, upon a trial on the merits setting aside a deed to the grantor's wife for the insanity of the grantor, is conclusive in a suit in another State, as to another deed, made at the same time by the same grantor, to a trustee for his wife.<sup>2</sup>

§ 512. In regard to proceedings in inferior tribunals it is held that a judgment of a justice of the peace cannot be properly authenticated, as required by act of Congress, and it is placed on the same basis as foreign judgments were.<sup>3</sup> The Supreme Court of Massachusetts said,<sup>4</sup> certainly we think the judicial proceedings referred to in the Constitution were supposed, by the Congress which passed the act providing for the manner of their authentication, to have related to proceedings of courts of general jurisdiction, and not those which are merely municipal authority, for it is required that the copy of the record shall be certified by the clerk of the court, and that there shall also be the certificate of the judge, chief justice, or presiding magistrate, that the attestation is in due form. This is founded upon the supposition that the court whose proceedings are to be thus authenticated, is so constituted as to admit of such officers; and the act has wisely left the record of magistrates who may be vested with limited judicial authority, varying in its objects and extent in every State, to be governed by the laws of the State into which they may be introduced, for the purpose of being carried into effect. In Connecticut and Vermont<sup>5</sup> and in those States where justices of the peace hold courts of record, a justice's judgment has been held to be within the acts of Congress, and not re-examinable where properly authenticated, and in Kentucky the

<sup>1</sup> *Indiana v. Holmer*, 21 Iowa, 379.

<sup>2</sup> *Hanta v. Read*, 102 Ill. 509; S. C., 40 Am. R. 638.

<sup>3</sup> *Robinson v. Prescott*, 4 N. H. 450; *Mahorn v. Buckford*, 6 N. H. 567; *Taylor v. Barron*, 30 N. H. 78.

<sup>4</sup> *Warren v. Flagg*, 2 Pick. 448.

<sup>5</sup> *Bissell v. Edwards*, 5 Conn. 94; *Starkweather v. Loomis*, 2 Vt. 573; *Beal v. Smith*, 14 Tex. 305; *Blodget v. Jordan*, 6 Vt. 580; *Carpenter v. Pier*, 30 Vt. 81; *Stockwell v. Coleman*, 10 Ohio S. 33.

judgment of an Indiana justice was held to be within the meaning of the Constitution and laws of the United States.<sup>1</sup> In a late case in the same State a plea of *nulla tibi record* was held bad, it being no denial of indebtedness, such judgments being, like foreign judgments, only *prima facie* evidence of indebtedness.<sup>2</sup> The doctrine in regard to judgments of other States, rendered by justices of the peace, inferior tribunals, not courts of record, is that it is conclusive if it is duly proved, and if the justice has jurisdiction to render it. But nothing can be presumed in favor of the jurisdiction of courts or magistrates having only a special or limited jurisdiction. The record should show that the judgment was within the limits of their jurisdiction.<sup>3</sup> But no recovery can be had on such judgment unless the pleadings contain enough to show that he had jurisdiction of the parties, of the cause, and the laws of the State are produced and proved in support of the allegation.<sup>4</sup> In a late case in Massachusetts on a justice's judgment, the court said, where it appeared by the statutes of Vermont, "a justice is authorized to accept and record a confession of any debt to a creditor made by the debtor personally, either with or without antecedent process, as the parties shall agree and render judgment on such confession," and the record of a justice, put in evidence, showed that the defendant appeared personally before the justice without antecedent process and acknowledged the debt to be due to the plaintiff, but it did not show that he agreed that such acknowledgment should be taken as a confession of judgment, or that judgment should be rendered thereon without antecedent process—in a suit upon such judgment in the superior court here, it was *decided* that the justice of the peace had no jurisdiction, and judgment

<sup>1</sup> Scott v. Cleveland, 3 Mon. 62; Silver Lake Bank v. Harding, 5 Ohio, 545; Thomas v. Robinson, 3 Wend 263; Kean v. Rice, 12 S. & R. 203; Danforth v. Thompson, 34 Iowa, 243.

<sup>2</sup> McElpatrick v. Taft, 10 Bush, 160.

<sup>3</sup> Danforth v. Thompson, 34 Iowa, 243; Kean v. Rice, 12 S. & R. 203; Bank v. Harding, 5 Ohio, 545; Thomas v. Robinson, 3 Wend. 263;

Wells v. Stevens, 2 Gray, 115; Hendrick v. Whittenmore, 10 Mass. 13; Sayles v. Bugas, 4 Mo. 42; Noyes v. Kellum, 18 Vt. 511; Wright v. Fletcher, 12 Vt. 431; Allen v. Zelman, 38 Ind. 429.

<sup>4</sup> Bad v. Smith, 4 Tex. 35; Thomas v. Robinson, 3 Wend. 267; Taylor v. Barron, 30 N. H. 78; Snyder v. Snyder, 35 Ind. 349; Drago v. Graham, 9 Ind. 212; Knapp v. Abell, 10 Allen, 485.

was properly ordered for the defendant.<sup>1</sup> A decree of a court of chancery and the judgment of a court of probate has been held within these provisions.<sup>2</sup> Their effect being dependent upon the *lex loci*.

§ 513. The universal doctrine is that a judgment rendered without jurisdiction is void, whether it be a foreign judgment or one rendered in the several states, but the question arises as to the mode of determining whether the court had jurisdiction, and for this purpose the question as to whether the court was properly constituted, whether it has complied with the local law so as to acquire jurisdiction over what it has assumed to decide is admissible; and there is a distinction between the courts of *superior or general jurisdiction* and those of *limited* and inferior jurisdiction. In regard to the former, the presumption is that they have acquired jurisdiction until the contrary is shown.<sup>3</sup> Every presumption is in favor of the jurisdiction of the court. The record is *prima facie* evidence of it, and will be held conclusive until clearly and explicitly disproved.<sup>4</sup> But in respect to courts of the latter class the rule is different; nothing is presumed in their favor, so far as it regards jurisdiction, and the party seeking to avail himself of their judgments must affirmatively show that they had jurisdiction.<sup>5</sup> In a case where an action was brought on a judgment of an inferior court of a neighboring state, it was held that it could not be sustained until the statute creating and organizing the court was produced and proved, that it might be seen whether the court had jurisdiction or not;<sup>6</sup> for

<sup>1</sup> *Henry v. Ellis*, 127 Mass. 474.

<sup>2</sup> *Hunt v. Lyle*, 8 Yerg. 112; *Nations v. Johnson*, 24 How. 203; *Patrick v. Gibbs*, 17 Tex. 275; *Pennington v. Gibson*, 16 How. 76; *Warren v. McCarthy*, 25 Ill. 102; *Low v. Mussey*, 41 Vt. 336; *Libbott v. Ray*, 3 Blackr. 384; *De Ende v. Winkonon*, 2 P. & H. 663; *Hale v. Hill*, 13 Mo. 613; *Halliburton v. Fletcher*, 22 Ark. 453; *Cumbers v. Corbin*, 38 Ga. 75.

<sup>3</sup> *Shumway v. Stillman*, 4 Cowen, 292.

<sup>4</sup> *Sheldon v. Hopkins*, 7 Wend. 435; *Wheeler v. Raymond*, 8 Cow. 311;

*Denning v. Corwin*, 11 Wend. 647; *Smith v. Fowle*, 12 Wend. 9; *Thomas v. Robinson*, 3 Wend. 267; *Cleveland v. Rogers*, 6 Wend. 438; *Pelton v. Plutner*, 13 Ohio. 209; *Foster v. Glazener*, 27 Ala. 391; *Gunn v. Howell*, 27 Ala. 663; *Shivers v. Wilson*, 5 Har. & J. 130; *Thatcher v. Powell*, 6 Wheat. 119; *Shufeldt v. Buckley*, 45 Ill. 223; *Draggou v. Graham*, 9 Ind. 212; *Cone v. Cotton*, 2 Blackf. 85, note; *Martin v. Kennard*, 3 Blackf. 430; *Grant v. Bledsoe*, 20 Tex. 456; *Beal v. Smith*, 14 Tex. 305.

<sup>5</sup> *Story, Conf. Laws*, § 539.

the courts of one state will not take judicial notice of the statutes of another. Still, another question arises in regard to the determination of the effect of foreign judgments as well as those of the several states. What is the measure of jurisdiction conferred on the courts rendering the judgment by the sovereign power of the place or state in which such judgment is rendered, considered in an international point of view? Jurisdiction, to be rightly obtained, must be either upon the person of the defendant, being within the territory of the sovereign, where the court sits, or else his property must be within such territory, otherwise no sovereignty can be exerted upon the principle." *Extra territorium iudicanti impune non paritur*, and should the law making power of a nation or state expressly grant to its judicial tribunals jurisdiction over persons or property not within its territory, such grant would be treated elsewhere as a mere usurpation, and all judicial proceedings under it utterly void. No sovereignty can extend its own process beyond its own territorial limits, to subject either persons or property to its judicial decisions.

§ 514. No court can, by its judgment, impose a lien or pass title to property, either real or personal, in a foreign state. Courts of Equity may compel parties over whom they have jurisdiction, to execute contracts for the sale of real estate in other sovereignties, or compel them to vacate such purchases when fraudulently made; but this power must be strictly limited to those cases where the relief decreed can be entirely obtained through the parties' personal obedience if it goes beyond that, the assumption will not only be presumptuous but ineffectual. While the law of a case is that of the land in which it has its legal seat, the remedy is that of the *lex fori*. It makes no difference what the law to which a case may be subject is, the *lex fori* must decide as to form of the suit in which such case is to be presented. That is, in all matters of practice, the *lex fori* is to be followed.<sup>2</sup> Such judg-

<sup>1</sup> *Massie v. Watts*, 6 Cranch, 148; *Ward v. Aundon*, Hopk. 213; *Mead v. Merritt*, 2 Paige, 402; *Mitchell v. Bunch*, 2 Paige, 606; *Arglasee v. Muschamp*, 3 Vern. 75; *Kildare v. Bustace*, 1 Vern. 75; *Cranstown v. Johnson*, 3 Ves. Jr. 170; *Jackson*

*v. Petrie*, 10 Ves. 174; *Penn v. Baltimore*, 1 Ves. 441; *Archer v. Preston*, 1 Vern 77.

<sup>2</sup> *Ferguson v. Fyffe*, 8 Cl. & Fin. 21, *Gen. St. Nav. Co. v. Guillon*, 11 M. & W. 877.

ment must be certain or definite, that is, it must be for fixed sum.<sup>1</sup> A decree by a court of equity in one state directing a conveyance of land situate in another, may be pleaded as a cause of action or as a ground of defense in the courts of the state where the land lies, although no conveyance has been executed; and, unless impeached for fraud, is entitled, in the court where so pleaded, to the force and effect of record evidence of the equities therein determined.<sup>2</sup> Where a suit in equity is brought in one state, to enforce a decree obtained in the courts of another state, the court will not inquire into the merits of such decree. But when the case shown by the record is such that no court could, upon any principles of law, have given the judgment unless imposed upon, this will be regarded as proof that the judgment was obtained by fraud on the court.<sup>3</sup> Thus judgment by a court of Kentucky that a deed given for lands in New Jersey is void, is a judgment as to the title of lands which the courts of the former state have no jurisdiction to make. Neither have they jurisdiction to decree a conveyance or deliver of possession, founded on such a judgment.

§ 515. A person, however, though a citizen of another State, when he comes within the territory of a particular sovereignty, contracts a sort of temporary allegiance to it, and may be justly subjected to its process, and bound personally by the judgments of its courts.<sup>4</sup> If the defendant was present in the foreign State when proceedings were begun, and process was served upon him, no irregularity, in such service, unless such as deprived it of all citatory effect, can be set up against the judgment ensuing thereon, in a suit on such judgment, in another State. Thus, A.,

<sup>1</sup> *Henderson v. Henderson*, 8 Q. B. 288; *Seller v. Robbins*, 1 Camp. 253.

<sup>2</sup> *Burnley v. Stevenson* 24 Ohio St. 471; *Yost v. Devault* 9 Iowa, 60; *Sutphen v. Fowler*, 9 Paige, 280; *Penn v. Haycraft* 14 Ohio St. 302; *Cleveland v. Burill*, 25 Barb. 522; *Fowler v. Harris* 1 H. & M. 5; *De Klyre v. Watkins*, 3 Sand. 187; *Scott v. Nesbitt*, 14 Ves. 438; *Maunder v. Lloyd*, 2 J. & H. 718; *Toller v. Carteret*, 2 Vern. 495; *Newton v. Bronson*, 13 N. Y. 587; *Brown v. Desmond*, 100 Mass.

267; *Davidson v. Parker*, 14 Allen, 94; *Pingree v. Collin*, 12 Gray, 304; *Miller v. Rusk*, 17 Tex. 170; *Hearst v. Kuykendall*, 16 Tex. 327.

<sup>3</sup> *Davis v. Hendley*, 22 N. J. Eq. 115.

<sup>4</sup> *Jardine v. Reichert*, 39 N. J. L. 165; *Peel v. January*, 35 Ark. 331; *S. C.*, 37 Am. R. 27; *Murphy v. Winter*, 18 Ga. 690; *Downer v. Shaw*, 22 N. H. 277; *Mowry v. Chase*, 100 Mass. 79.

a citizen of St. Louis, sued B., a citizen of Arkansas, in the circuit court of the county in which B. lived, and, in order to get jurisdiction of his person and sue him in St. Louis, had him served in Arkansas with notice to take depositions in St. Louis for evidence in the pending suit in Arkansas, thereby inducing him to go to St. Louis, where service was made upon him in a suit begun there, on which judgment was afterwards obtained by default. Suit being brought in Arkansas against B. upon this judgment, he set up the above facts in defense. However such fraud might have affected the judgment in Missouri, or might have been a reason for an injunction against the judgment in equity, it was no defense to an action at law upon the judgment.<sup>1</sup> A personal service by notice, in order to give the courts of one State jurisdiction of a cause, the defendant in which, resides in another, so that a judgment in such cause may be enforced in the latter State, must be such a notice as a court is competent to direct, and which can be served within its jurisdiction;<sup>2</sup> and whenever the jurisdiction is founded upon the person within the territory, or their *property* being there, the judgment will be valid, so far as that jurisdiction could legitimately extend, but no farther. One of the most ordinary kind of actions is, that termed foreign attachment, and the process is against the property of non-resident debtors, and when that is attached and judgment rendered upon process of this kind, it binds the property; for this is the extent of the jurisdiction of the court.<sup>3</sup> But as the judgment is *in rem* against the *res*, it can have no effect as a judgment *in personam*, and is not regarded in other States or among foreign nations as evidence of any debt, nor does it receive the same credit or effect of a judgment *in personam*.<sup>4</sup> The reason is that the court can only acquire jurisdiction over the property, and there can be no jurisdiction or

<sup>1</sup> Peel v. January, 35 Ark. 331; S. C., 37 Am. Rep. 27.

<sup>2</sup> Ewer v. Coffin, 1 Cush. 23.

<sup>3</sup> Green v. Van Buskirk, 7 Wall. 139; Melhop v. Doane, 31 Ia. 397; Moore v. Spackman, 12 S. & R. 287; Molyneux v. Seymour, 30 Ga. 440; Hale v. Williams, 6 Pick. 232.

<sup>4</sup> Arndt v. Arndt, 15 Ohio 33; Robinson v. Ward, 8 Johns. 86; Kilham v. Woodworth, 5 Johns. 41; Bates v. Delevan, 8 Johns. 86; Thompson v. Emmert, 4 McL. 96; Lincoln v. Tower, 2 McL. 473; Melhop v. Doane, 31 Ia. 397; Ward v. McKenzie, 33 Tex. 497; Sevier v. Roddie, 57 Mo. 580.

adjudication other than that which is limited to the *Res* only.<sup>1</sup> Proceedings in *Rem* are governed by the same principles as those of domestic judgments, and the adjudication is binding on the property in question, if within the jurisdiction where the proceedings were commenced, and subject to the lien of the libel or attachment.

§ 516. In order that a judgment may have the conclusive effect of a judgment *in personam*, the process must be personally served upon the defendant, or he must appear in person or by attorney in the action,<sup>2</sup> and it must be served upon the defendant while he is within the jurisdiction of the sovereignty under which the court acts, for no sovereign has the right to issue such notice to the citizen of another State or country, and thereby draw the party from his own proper forum *ad alium exanere*. But if a party chooses to appear and contest the merits, submit to the jurisdiction of the court, waiving his personal immunity, the judgment is as conclusive as though he be a resident or citizen of the sovereignty in which the judgment is obtained, and the effect, credit and faith accorded to it in every other State, will be the same as that accorded to it in the State where it is recovered.<sup>3</sup> It is too late then to contest the question of jurisdiction.<sup>4</sup> In a late case, it was held that where, in a civil action in a sister State, the defendant was not served with process, and did not appear; but being proceeded against in the name of the State for contempt, in resisting an attachment therein, he appeared by

*Green v. Van Buren*, 7 Wall. 132; *Lincoln v. Tower*, 2 McL. 473; *Cochran v. Fitch*, 1 Sand. Ch. 146; *Wheeler v. Lewis*, 2 McL. 511; *Buchanan v. Rucker*, 9 East. 192; *Steele v. Sadler*, 7 W. & S. 417; *Whiting v. Johnson* 5 Dana, 390; *Miller v. Miller*, 1 Bailey, 242; *Smith v. Nichols*, 5 Bing. N. C. 298; *Chamberlain v. Farris*, 1 Mo. 517; *Hall v. Williams*, 6 Pick. 332; *Wilson v. Miles*, 2 Hall, 358; *Bequet v. McCarthy*, 2 B. & A. 951; *Molyneux v. Seymour*, 30 Ga. 440; *Watkins v. Holman*, 16 Pet. 25; *Vauquelin v. Bonard*, 15 C. B. N. S. 341; *Barrow v. West*,

23 Pick. 270; *Meeus v. Thelluson*, 8 Exchq. 638.

<sup>1</sup> *Baxley v. Linah*, 16 Pa. St. 241; *Barnes v. Gibbs*, 31 W. J. L. 317; *Brown v. Lexington & Co.*, 13 N. J. L. 191; *Rogers v. Odell*, 30 N. H. 457; *Clair v. Eureka Works*, 45 N. H. 547; *Bank v. Brown*, 50 Me. 214; *Cincinnati, &c. Co. v. Wynne*, 11 Ind. 385; *Lapham v. Briggs*, 27 Vt. 29; *Nichol v. Mason* 21 Wend. 330.

<sup>2</sup> *Harbin v. Chiles*, 20 Mo. 314; *Cone v. Hooper*, 18 Minn. 531; *Nations v. Johnson*, 24 How. 195; *Pennoyer v. Neff*, 95 U. S. 714.

<sup>3</sup> *Rogers v. Rogers*, 15 B. Mon. 364.

counsel in the proceeding for contempt; an action could not be maintained in Massachusetts on a judgment rendered against him in the suit.<sup>1</sup> It has been held<sup>2</sup> that the judgments and decrees of courts of other States are only *prima facie* evidence in the courts of Illinois, of the right of the plaintiff to recover against one who at the time of bringing the former suit was a resident of that State. This rule cannot be sound if the defendant was personally served, though temporarily within the jurisdiction of such foreign tribunal.

§ 517. A judgment obtained in a court of one State cannot be enforced in the courts and against a citizen of another, *unless* the court rendering the judgment has acquired jurisdiction over the defendant by actual service of process upon him, or by his voluntary appearance to the suit and submission to that jurisdiction. Such a judgment may be perfectly valid in the jurisdiction where rendered, and enforced there even against the property, effects, and credits of a non-resident defendant there situated, but it cannot be enforced or made the foundation of an action in another State. A law which substitutes constructive for actual notice is binding upon persons domiciled within the State where such law prevails, and as respects the property of others there situated, but can bind neither person nor property beyond its limits. This rule is based upon international law, and upon that natural protection which every country owes to its own citizens. It concedes the jurisdiction of the court to the extent of the State where the judgment is rendered, but upon the principle that it would be unjust to its own citizens to give effect to the judgments of a foreign tribunal against them; when they had no opportunity of being heard, its validity is denied. This doctrine is in no wise affected by the provision of the Constitution of the United States and the Acts of Congress passed in pursuance thereof, that "full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State; and the Congress may by general laws, prescribe the manner in which such Acts, records and judicial proceedings shall be

<sup>1</sup> McDermott v. Clary, 107 Mass. 501; Barkman v. Hopkins, 11 Ark. 157; Whittier v. Wendall, 7 N. H. 257; Winston v. Taylor, 28 Mo. 82, Inglehart v. Moore, 16 Ark. 46, Ryan v. Vallandigham, 25 Ill. 125.

<sup>2</sup> Jones v. Warner, 81 Ill. 343.

proved, *and it is effect thereby.*" This is the uniform rule upon the effect of this class of judgments.<sup>1</sup> This rule has been enforced in numerous instances and against judgments obtained without notice under various laws and in various modes. Its application is to be determined by the circumstances of each case as it arises.

§ 518. The whole subject has been very fully and ably considered in the recent case of *Pennoyer v. Neff*.<sup>2</sup> "The force and effect of judgments rendered against non-residents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States and of the several states, as attempts have been made to enforce such judgments in states other than

<sup>1</sup> *Starr v. Hickert*, 32 Md. 367; *McCormack v. Deaver*, 22 Md. 193; *Wong v. Pawling*, 5 G. & J. 510; *Pennoyer v. Neff*, 95 U. S. 714; *Board v. Cohen*, 17 Wall. 521; *Hes v. Eldredge*, 18 Kr. 290; *Chew v. Brumman*, 21 N. J. Eq. 520; *Howell v. Gordon*, 40 G. 292; *Mals v. Dwyer*, 7 Cranch. 481; *Despat v. Swan*, 5 Mass. 35; *Battick v. Allen*, 8 Mass. 273; *Dearty v. Barnett*, 2 Barb. 96; *Schlesby v. Westendorf*, L. R. 8 Q. B. 153; *Buchanan v. Baker*, 9 East. 199; *Haydock v. Backwood*, 8 T. R. 298; *Howles v. Coe*, 1 Y. & Coll. 464; *Enos v. Coffin*, 1 Cranch. 23; *Arndt v. Arndt*, 15 Ohio, 23; *Peck v. Glazner*, 27 Ala. 396; *McVicker v. Brady*, 31 Mo. 316; *Patton v. Hickok*, 39 Vt. 292; *Martin v. Ins. Co.*, 21 N. J. L. 222; *Gillett v. Camp*, 23 Mo. 375; *Frumble v. Long*, 14 Ohio S. 420; *Smith v. Smith*, 17 Ill. 482; *Pollard v. Waggoner*, 13 Wis. 569; *Jones v. Spencer*, 15 Wis. 583; *Castrique v. Imrie*, L. R. 4 H. L. 428; *Shaw v. Gould*, L. R. 3 H. L. 55; *Buschoff v. Wetland*, 9 Wall. 812; *Kerr v. Kerr*, 41 N. Y. 275; *Webster v. Reid*, 11 How. 460; *Boswell's Lessee v. Otis*, 9 How. 370; *Kilbourn v. Woodworth*, 5 Johns. 40; *Robinson v. Ward*, 8 John. 86; *Bis-*

*sell v. Briggs*, 9 Mass. 464; *Fenton v. Garlick*, 8 John. 194; *D'Arcy v. Ketchum*, 11 How. 165.

<sup>2</sup> *Pennoyer v. Neff*, 95 U. S. 714; *Bartlett v. Spicer*, 75 N. Y. 528; *Mickey v. Stratton*, 5 Sawyer, 475; *Smith v. Curtis*, 38 Mich. 393; *St. Clair v. Cox*, 108 U. S. 354; *Pana v. Bowler*, 107 U. S. 527; *Cooper v. Reynolds*, 10 Wall. 308; *Brooklyn v. Ins. Co.*, 99 U. S. 362; *Empire v. Darlington*, 101 U. S. 87; *Pope v. Manfg. Co.*, 87 N. Y. 137; *Bank v. Peabody*, 55 Vt. 492; *D'Arcy v. Ketchum*, 11 How. 165; *Ruggles v. Coleman*, *Harding*, 413; *Tharber v. Blackburne*, 1 N. H. 242; *Whittier v. Wendell*, 7 N. H. 257; *Sim v. Frank*, 25 Ill. 125; *Jones v. Warner*, 81 Ill. 348; *Kilburn v. Woodworth*, 5 Johns. 41; *Robinson v. Ward*, 8 Johns. 86; *Bates v. Delevan*, 3 Paige, 290; *Starbuck v. Murray*, 5 Wend. 149; *Bissell v. Briggs*, 9 Mass. 462; *Pelton v. Platner*, 13 Ohio, 202; *Aurd v. Arndt*, 15 Ohio, 23; *Rogers v. Burris*, 27 Pa. St. 525; *Winston v. Taylor*, 28 Mo. 82; *Ourlwith v. Porter*, 13 Mich. 533; *Kentchler v. Jamison*, 6 Mo. App. 135; *Price v. Hickok*, 39 Vt. 292; *Rangely v. Webster*, 11 N. H. 299; *McEwen v. Zimmar*, 38 Mich. 765.

those in which they were rendered, under the provision of the Constitution requiring that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state;" and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, and declaring that when thus authenticated, "they shall have the same faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are or shall be taken." In the earlier cases it was supposed that the act gave to all judgments the same effect in other states which they had by law in the state where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state itself to exercise authority over the person or the subject matter." "Every independent government, is at liberty to prescribe its own methods of judicial process, and to declare by what forms parties shall be brought before its tribunals. But, in the exercise of this power, no government, if it desires extra-territorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus, a judgment *in personam* by the court of a State against a citizen of such State, in his absence, and without any notice, express or implied, would be regarded in every external jurisdiction as absolutely void and unenforceable. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign State." National comity is never thus extended; even the proceeding is deemed an illegitimate assumption of power and resisted as mere abuse; no faith and credit or force and effect has been given to such judgments by any state of the Union, courts uniformly and in many instances hold them to be void. "The international law, as it existed among the states in 1790, was that a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction

<sup>1</sup> *M'Elmoyne v. Cohen*, 13 Peters, 312.

nor that of courts of justice had binding force." The act of Congress did not intend to declare a new rule or to embrace judicial records of this description. The doctrine is that the act "was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result; nor those rules of public law which protect persons and property within one state from the exercise of jurisdiction over them by another."

"In all the cases brought in the state and federal courts, where attempts have been made under the act of Congress to give effect in one state to personal judgments rendered in another state against non-residents without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception, that such judgments were without any binding force, except as to property or interests in property within the state, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained and the party did not voluntarily appear, as effectual and binding merely as a proceeding *in rem*, and as having no operation beyond the disposition of the property or some interest therein. For the reason, that the tribunals of one state have no jurisdiction over persons beyond its limits, and can only inquire into their obligation to its citizens when exercising its conceded jurisdiction over their property within its limits."

§ 519. There are two well-established principles of public law respecting the jurisdiction of an independent State over persons and property. The several States of the Union are not, it is true, in every respect independent; many of the rights and powers which originally belonged to them are now vested in the government created by the Constitution. But except as restrained and limited by that instrument they possess and exercise the authority of independent States, and the principles of public law are applicable to them. One of these principles is that every

State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants ; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced ; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed and transferred. The other principle of public law referred to follows from the one mentioned, that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. The laws of one State have no operation outside of its territory, except so far as is allowed by comity ; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. Any exertion of authority of this sort is a mere nullity, and incapable of binding such persons or property in any other tribunals.

“ But as contracts made in one State may be enforceable only in another State, and property may be held by non-residents, the exercise of the jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a State affecting persons resident or property situated elsewhere, no objection can be justly taken, whilst any direct exertion of authority upon them, in an attempt to give ex territorial operation to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the State in which the persons are domiciled, or the property is situated, and be resisted as usurpation.

“ Thus the State, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as

such formalities can be complied with, and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the State within which it is situated.<sup>1</sup>

"So the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demands of its own citizens against them, and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens, and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then only be carried to the extent necessary to control the disposition of the property. If the non-residents have no property in the State, there is nothing upon which the tribunals can adjudicate.

"Where a party is within a territory, he may justly be subjected to its process and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear judgment may be pronounced against him, such judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason that, except so far as the property is concerned, it is a judgment *coram non judice*."

Thus, in a late case,<sup>2</sup> the Supreme Court of the United States say: "It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose.<sup>4</sup> But in such a case, as in the

<sup>1</sup> Penn. v. Lord Baltimore, 1 Vesey, 444; Mass. v. Watts, 6 Cranch, 148; Watkins v. Holman, 16 Peters, 25; Corbett v. Nutt, 10 Wallace, 475.

<sup>2</sup> Picquet v. Swan, 5 Mason, 43.

<sup>3</sup> Hart v. Sanson, 110 U. S. 151

<sup>4</sup> Felch v. Hooper, 119 Mass. 52; Ager v. Murray, 105 U. S. 126.

ordinary exercise of its jurisdiction, a court of equity acts *in personam*, by compelling a deed to be executed or canceled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title.

"In the judgment in question, no trustee to act in behalf of the defendant was appointed by the court, nor have we been referred to any statute authorizing such an appointment to be made. The utmost effect which can be attributed to the judgment, as against Hart, is that of an ordinary decree for the removal by him, as well as by the other defendants, of a cloud upon the plaintiffs' title.

"Such a decree, being *in personam* merely, can only be supported, against a person who is not a citizen or resident of the State in which it is rendered, by actual service upon him within its jurisdiction; and constructive service by publication in a newspaper is not sufficient. The courts of the State might perhaps feel bound to give effect to the service made as directed by its statutes. But no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court. The judgment would be allowed no force in the courts of any other State; and it is of no greater force, as against a citizen of another State, in a court of the United States, though held within the State in which the judgment was rendered."

§ 520. The judgment of a court of a sister State in a proceeding by foreign attachment, where the defendant has not been served nor appeared, is not evidence of the debt.<sup>2</sup> In an action on a judgment recovered in another State against two defendants, only one of whom was served with process, there can be no

<sup>1</sup> Hollingsworth v. Barbou, 4 Pet. 466; Bo-well v. Otis, 9 How. 336; Bischoff v. Wethered, 9 Wall. 812; Knowles v. Gaslight Co., 19 Wall. 58; Pennoyer v. Neff, 95 U. S. 714; Schibsy v. Westerholtz, L. R. 6 Q. B. 155; The City of Mecca, 6 P. D. 106.

<sup>2</sup> Curtis v. Gibbs, 1 Pa. St. 399; Starbuck v. Murray, 5 Wend. 148; Holbrook v. Murray, 5 Wend. 161;

Robinson v. Ward, 8 J. L. 386; Pawling v. Bird, 13 J. L. 310; Chamberlain v. Paris, 1 Mo. 27; Phelps v. Hicker, 1 D. L. 291; Smith v. Smith, 7 W. & S. 117; Armit v. Armit, 15 Ohio, 23; Paine v. Smith, 12 La. Ann. 798; Jones v. Spencer, 15 Wis. 583; Price v. Hokek, 39 Vt. 292; Eastman v. Wadleigh, 65 Me. 251; S. C., 20 Am. R. 695.

recovery, even against the one served.<sup>1</sup> Nor will an action lie in another State upon a judgment against a foreign corporation, without appearance.<sup>2</sup>

§ 521. Judgments rendered on constructive service, where the defendant's property is proceeded against, as by attachment, are valid in the State where rendered, to the extent of the amount realized from the sale of the property, and have no other effect in any State. Such judgments do not merge the cause of action. As for example, where suit is brought on a note for a thousand dollars, the note being executed by a non-resident of the State, who may have real or personal property in the State where the holder of the note resides, he commences suit by attachment of such property, and it realizes on execution sale five hundred dollars, which is a credit on the note. This judgment will not merge the note or prevent its being sued upon for the residue by the holder or his assignee in an action against the maker where he can obtain a personal judgment, based upon personal service.<sup>3</sup> In a well reasoned opinion, the Supreme Court of Vermont, in a similar case, said: "The point here is whether the New Hampshire judgment, as a personal judgment, was void or only voidable. The facts were, that the plaintiff, a National bank, was located in Vermont; one of the defendants was a resident of Vermont, and the other of Louisiana. The plaintiff obtained a judgment by default in a court in New Hampshire, having attached the defendant's real estate situated there; but no personal process of service was made, no notice was given except a constructive one by publication according to the laws of New Hampshire, and no appearance by the defendants. In an action brought upon the same cause of action as the former one, *held*, that the original cause of action was not merged in the New Hampshire judgment; and that this action could be sustained." "The ground upon which it would be pronounced voidable would be, that the court never obtained jurisdiction over the persons of the defendants; but this would make the judgment void. The judgment was rendered by reason of jurisdiction over property of the defendants. In its operation and effect upon that, it

<sup>1</sup> *Hanley v. Donohue*, 59 Md. 239; S. C., 43 Am. R. 554.

<sup>2</sup> *Gilchrist v. Land Company* 21 W. Va. 115; S. C., 45 Am. R. 555.

<sup>3</sup> *Smith v. Curtis*, 38 Mich. 303.

was neither void nor voidable. Beyond that, it was either valid or invalid, independent of the choice of either party. It was not erroneous. There was no error in it. The proceeding was regular. The court had the right to proceed as it did proceed; and to the extent that the judgment was satisfied by the property attached, the proceeding would bar a recovery in this action. To that extent the judgment there is available here in behalf of the defendants, the same as a payment would be. That is, that judgment is conclusive between the parties as to the property of the defendants there attached and appropriated to its satisfaction, but beyond that, and as a judgment *in personam*, we think it is a nullity. The court, having no jurisdiction of the defendants, had no power to adjudge as against them upon the amount of the plaintiff's claim, no power to pass upon the defendant's personal rights and obligations; therefore, a judgment in form against them, as an incident of the proceeding against the property attached, could not operate as a merger of the original claim. We think the proceedings had no further force or effect than to enable the New Hampshire court to apply the property there attached, or its proceeds, on the plaintiff's claim as established in that proceeding; that beyond this it created no right, either against the defendant or in behalf of the plaintiff. It therefore furnished no basis upon which to bring a suit. We do not think the effect of the attachment was to aid the constructive service of the process so as to make it equivalent to personal service, except to the extent that the court was reaching after property within its jurisdiction. "Jurisdiction of the property does not draw after it jurisdiction of the person."

"The case of *Rangely v. Webster* was similar to this in the facts and question involved, and the same conclusion was reached. In a well stated opinion the court say: 'To maintain the position that in the case of an action upon the judgment the judgment is void, and may be so treated, but that when the action is upon the original demand, the same judgment is valid, is to maintain that the form and manner of the action adopted determine the character of the former judgment, its validity, or invalidity, instead of the facts and circumstances attending its recovery.'"

<sup>1</sup> 11 N. H. 299.

*tier v. Wendall*, 7 N. H. 257; *Downer*

<sup>2</sup> *Bank v. Peabody*, 55 Vt. 402; *Whit-* *v. Shaw*, 22 N. H. 282; *Wright v.*

§ 522. While it is well settled that the courts of any State or country can have no extra-territorial jurisdiction so as to give notice, serve process, or charge persons or property beyond their respective boundaries, and when thus unable to acquire jurisdiction of the person against whom legal proceedings are by statute authorized, and nominally taken without actual service on him, the proceedings can be treated as *in rem* only in respect to property within the jurisdiction, this doctrine is not applicable when the person so sought to be charged by judgment is a subject or citizen of the country where and at the time the proceedings are taken, and when they are in conformity to the statute there, although the person be then absent from the country, and that is put upon the ground that the person domiciled there owes allegiance to the country and submission to its laws.<sup>1</sup> And therefore a judgment may, in such case be rendered against and charge a defendant *in personam*, without any personal service upon or actual notice to him, and in his absence from the country. There are only a few reported cases in this country where that proposition has been considered. In the United States Supreme Court a question somewhat analogous was decided in like manner as applied to the United States.<sup>2</sup> And the same doctrine announced in several States that if the defendants had been residents of, but temporarily absent from the State, which occasioned the lack of personal service, they would have been upon principles of international law subject to the laws and the jurisdiction of the courts of that State; therefore the plaintiff would also be bound by such judgment.

Without stating the principle more at length, it may be assumed that by reason of the relation between the State and its

Boynton 37 N. H. 9; Bank v. Butman, 29 Me. 19; Kane v. Cook, 8 Cal. 449; Scott v. Litch, 44 Iowa, 570; Bell v. McCulloch, 31 Ohio St. 137.

<sup>1</sup> Douglas v. Forrest, 4 Bing. 686; Baquet v. McCarthy, 2 Barn. & Adol. 951; Bank v. Nias, 16 Q. B. 717; Bank v. Harding, 9 C. B. (M. G. & S.) 601; Vallee v. Demergue, 4 Exch. 290; Meens v. Thellusson, 8 Exch. 638; Copin v. Adamson L. R.

9 Exch. 345.

<sup>2</sup> Insurance Company v. French, 18 How. 404; approved in St. Clair v. Cox, 106 U. S. 356; Pennoyer v. Neff, 95 U. S. 714.

<sup>3</sup> Gibbs v. Insurance Company, 63 N. Y. 114; Hunt v. Hunt, 72 N. Y. 218; S. C., 28 Am. Rep. 129; Cassidy v. Leetch, 53 How. Pr. 108; Huntley v. Baker, 33 Hun, 578; Henderson v. Staniford, 105 Mass. 504.

citizen, which affords protection to him and his property, and imposes upon him duties as such, he may be charged by judgment *in personam*, binding on him everywhere as the result of legal proceedings instituted and carried on in conformity to the statute of the State, prescribing a method of service which is not personal, and which in fact may not become actual notice to him. And this may be accomplished in his lawful absence from the State.

Each State has the authority to provide the means by which its own citizens, or those who are residents therein temporarily, may be brought before its courts; and courts of other States as well as Federal courts have no authority to disregard the means thus provided; and every decree or judgment obtained in a State against any of its citizens by virtue of a statutory though not technically personal service, as for instance by leaving a copy at the usual place of abode, etc., of the defendant in the county, is obligatory upon such citizen in every other State or Federal tribunal as it is in the State where such judgment was rendered.<sup>1</sup>

§ 523. The question of the effect of an appearance of a defendant in an action, when there is a recital in the record that the parties appeared by attorneys, naming the attorney for the plaintiff and defendant, is one upon which the question of jurisdiction also depends, where there is no recital of personal service, and this, like the recital of personal service, must be regarded as prima facie or presumptive evidence that the defendant did appear, but is<sup>2</sup> liable to be overcome by proof that the appearance of such attorney was unauthorized; such appearance without authority is fraudulent, and notwithstanding such defendant contradicts the recitals in the record, it is a valid defense for the purpose of impeachment and may be set up in opposition to the record. The defendant may show that no service was made upon him and that the appearance entered for him was fraudulent,<sup>3</sup> being without authority.

Presumptively an attorney of a court of record, who appears for a party, has authority to appear for him, and though the

<sup>1</sup> *Jardine v. Reichert*, 39 N. J. L. 169.

<sup>2</sup> *Houston v. Dunn*, 13 Tex. 476.

<sup>3</sup> *Hill v. Mendenhall*, 21 Wal. 473;

*Marx v. Fore*, 51 Mo. 49; *Abbott v. Kenney*, 4 Conn. 3-9; *Cox v. Haven*, 31 Conn. 190; *Sullivan v. Guman* 126 Mass. 36.

party for whom he has appeared, when sued on a record in which judgment has been entered against him on such attorney's appearance may prove that the attorney had no authority to appear, yet it is not allowable under a plea of *nul tiel record* only, it must be on a special plea, or on such a plea as under the systems which do not follow the common law system of pleading is the equivalent of such plea.<sup>1</sup> The Supreme Court of Missouri say that the plea must be coupled with allegations that such defendant has a good defense on the merits and so has been injured by such fraudulent appearance.<sup>2</sup>

§ 524. The ancient common law required the parties to be present, and prosecute or defend, in person. It required a patent, or special authority from the crown (*a dedimus potestatem de attorney faciendo*), to enable parties to appear by attorney. Afterwards, by various statutes, the right to appear by attorney was recognized. But a party might still sue or defend in person, and the right to prosecute or defend was a mere privilege intended for the convenience and benefit of suitors. In the earlier stages of the law attorneys were appointed orally in court. Afterwards they were allowed to be appointed by warrant out of court, and the practice of the court was to require the warrant to be filed, which might, however, be done at any time before judgment, and the want of it in the record was aided by statute, and could not be assigned for error. This strictness has been gradually relaxed, until it is at the present time the settled rule that, although an attorney cannot, without special authority, admit service of *jurisdictional process* upon his client, yet it will be presumed in all collateral proceedings, and perhaps on appeal or in error, that a regular attorney at law who appeared for a defendant, though not served, had authority to do so. There are a number of cases which decide that in a suit or a direct action on a judgment rendered against a party upon an unauthorized appearance by an attorney, if that judgment is a domestic one, the party can not plead in defense his ignorance of the suit and the attorney's want of authority to appear for him. But the contrary is now settled with respect to foreign judgments, and consequently a judgment debtor, in an action against him on the

<sup>1</sup> *Hill v. Mendenhall*, 21 Wall. 453.

<sup>2</sup> *Marx v. Fore*, 51 Mo. 69.

judgment of another State, may successfully defend by showing that the attorney who entered an appearance for him had no authority so to do.<sup>1</sup> In the leading case on this subject, Judge Dillon, in delivering the opinion of the court and giving the reasons for this change, says: "No examination of this subject would be complete without reference to the leading authorities in English and American courts. It is laid down as law in an early case<sup>2</sup> that "when an attorney takes on himself to appear, the court looks no further, but proceeds as if the attorney had sufficient authority, and leaves the party to his action against him." This rule has, we submit, no foundation in reason to stand upon. It obliges a person to be bound by the unauthorized act of a mere stranger. It binds him by the judgment of a court without a day in court. It relieves the other party of the duty which in reason belongs to him, viz: *to serve his process, and to see, at his peril, that his adversary is in court.* It carries out this unsoundness by compelling the *wrong party* to look to the attorney. True reason and logic would say, if an attorney appeared for me without my knowledge or authority, express or implied, I should not be bound by the act if never ratified or promptly disavowed, and if the adverse party, being ignorant of the want of authority and carelessly omitting to serve process or to require the attorney to show his authority, has been damaged, he and not myself should be the one to look to the attorney.

"That such a rule as the one laid down in 1 Salkeld, 86,

<sup>1</sup> Gleason v. Dodd, 4 Met. 333; Arnott v. Wood, 1 Dill. 362; Hill v. Mendenhall, 21 Wall. 453; Marx v. Fore, 51 Mo. 69; Aldrich v. Kenney, 4 Conn. 389; Colt v. Haven, 30 Conn. 190; Osborn v. Bank, 2 Wheat. 829; Shelton v. Tiffin, 6 How. 186; Camfer v. Anawalt, 2 Watts, 490; Campbell v. Kent, 3 Pa. St. 75; Newcomb v. Dewey, 27 Iowa, 381; Sherard v. Nevins, 2 Ind. 241; Miller v. Gaskins, 3 Rob. (La.) 94; Wilson v. Bank, &c., 6 Leigh, 570; McKelway v. Gray, 17 N.J.L. 345; Hinchman v. Mackall, 8 Greene, 170; Thompson v. Whitman, 18 Wall. 457; Watson v. Bank, 4 Met. 343; Bodurtha v. Goodrich,

3 Gray, 508; Dennison v. Hyde, 6 Conn. 508; Welch v. Sykes, 8 Ill. 197; Sumway v. Stillman, 6 Wend. 447; Kerr v. Kerr, 41 N. Y. 272; Westcott v. Brown, 13 Ind. 83; Lawrence v. Jarvis, 32 Ill. 394, 11 Story v. Blackman, 20 Iowa, 161; Lattrell v. Cook, 1 Iowa, 1; Birtzel v. No 51, 1 Iowa, 588; D'Arcy v. Keelham, 11 How. 165; Harris v. Hardman, 14 How. 334; Thompson v. Emmert, 15 Ill. 415; Norwood v. Cobb, 20 Tex. 588; Rape v. Heaton, 9 W. & S. 328; Price v. Ward, 25 N. J. L. 235; Hess v. Cole, 23 N. J. L. 116; Courtney v. Dyer, Tenn.

<sup>2</sup> 1 Salk. 86.

should permanently stand, without modification, as the law of enlightened tribunals, would be impossible. But, as I shall proceed to show, 'the courts, instead of overturning it at once, have gradually undermined it, until, if it now stands, it is tottering and ready to fall.' In *Salkeld*, 88, 'an attorney appeared, and judgment was entered against his client, and he had no warrant of attorney, and now the question was if the court could set aside the judgment? *Et per cur.* If the attorney be able and responsible we will not set aside the judgment. The reason is, the judgment is regular, and the plaintiff ought not to suffer, for there is no fault in him; but, if the attorney be not responsible, or suspicious, we will set aside the judgment; for otherwise, the defendant has no remedy, and any one may be undone by that means.' "Such a doctrine could not impose on the fine understanding and solid judgment of Lord Mansfield, and the case of *Robson v. Eaton*<sup>1</sup>, without professedly overruling the cases in *Salkeld*, does so in effect by proceeding upon directly opposite principles. This will be obvious from a brief statement of the case, which was an action for money had and received. The defendant pleaded that the plaintiffs, by William Hodgson, their attorney, had before sued the defendant and recovered a judgment for the same cause of action; that the defendant, by order of the court, paid the amount of such recovery into court, and the same had been received by the plaintiffs' said attorney. This was apparently a good defense. To it the plaintiffs replied that they never retained said Hodgson to sue the defendant, or authorized him to receive the money. Both parties were innocent of fraud. The warrant of attorney under which Hodgson acted, was forged; Hodgson, ignorant of the forgery, collected the money, and in good faith paid it to the forger. And the question was, could the defendant rely upon the former recovery, or must he pay the money twice? Now, I suppose, if on grounds of public policy, a *defendant* is bound by the act of an unauthorized attorney who appears for him, the plaintiff ought, upon the same ground, to be bound by the act of an unauthorized attorney who appears for him. The principle is the same. It was decided that the defendant must again pay the money. And the ground of the decision was that the "attorney who prosecuted the former

<sup>1</sup> *Robson v. Eaton*, K. B. 1785, 1 T. R. 62.

suit in the plaintiff's name, had no authority for so doing.' After reviewing the New York decisions, he says: "in other States it is now the constant practice to relieve parties, sometimes by motion and sometimes in chancery, from judgments rendered against them in consequence of the totally unauthorized acts of a pragmatical attorney.'

"And in England, in the Court of Exchequer, the rule as laid down in *Salkeld*, has quite recently, and upon great consideration, been criticised and partially, at least, overturned. In *Bagley v. Buckland*,<sup>2</sup> where Rolfe B., alluding to 1 *Salkeld*, 88, says: 'The non-responsibility, or suspiciousness, of the attorney, is but a vague sort of criterion of safety to the defendant, and by the hypothesis the defendant is wholly without blame, and may, notwithstanding be ruined. It is true that the plaintiff is equally blameless, but then the plaintiff, if the judgment be set aside, has his remedy against the defendant as before, and suffers only the delay and the possible loss of costs.' And the court, where the appearance for the defendant is unauthorized, proceeds to make a distinction between cases where process has been served, and cases where it has not.

§ 525. "If, says the court, the *process is served*, the plaintiff, innocent of any fraud or collusion, and the attorney is responsible, the party for whom the attorney appeared is confined to his remedy against him. The reason given is, that here the plaintiff is without blame, and the defendant is guilty of negligence in not appearing and making his defense by his own attorney, if he has any defense on the merits. But on the other hand, if the plaintiff, *without serving the defendant*, accept the appearance of an unauthorized attorney for the defendant, he is not wholly free from the imputation of negligence; the law requires him to give notice to the defendant by serving the writ, and he has not done so. The defendant is then wholly free from blame, and the *plaintiff* not; so we must set aside the judgment." The *action*

<sup>1</sup> *Critchfield v. Porter*, 3 Ohio, 518; *Shelton v. Tiffin*, 6 How. 163; *Campbell v. Bristol*, 19 Wend. 101; *Trust v. Wainwright*, 4 Gilm. (Ill.) 420; *De Louis v. Meek*, 2 G. Greene, 55; *Kelway v. Jones*, 17 N. J. L. 345;

*Prie v. Ward*, 27 N. J. L. 225; *Ridge v. Alter*, 14 La. Ann. 866; *Porter v. Spaulding*, 3 G. Greene, 114.

<sup>2</sup> 1 Exch.; 1 W. H. & G. 1.

<sup>3</sup> *Harley v. Blackmarr*, 20 Iowa, 161.

judge then refers to the following additional English authorities.<sup>1</sup> "A defendant, who is allowed to avoid a judgment by contradicting the return of a sheriff that no service was ever made upon him, may as well be allowed to show that the appearance of the attorney was without authority as to show that the return of the sheriff was false. In both cases, it rests upon the ground that no person should be held bound by a judgment against him, where he has no notice in law, or day in court, and where in fact the court had no jurisdiction as to him. That the party in such case might have a remedy against the attorney or sheriff does not alter the case or make the judgment valid.<sup>2</sup> So that the rule may be stated to be that where the record contains no allegation of personal appearance by the defendant, but merely recites an appearance by attorney, it may be shown that such attorney had no authority to appear. When, however, the attorney is authorized to appear, or service is had on the defendant, the jurisdiction is then complete, and any action by the attorney binds the defendant, for after service of summons or an authorized appearance of an attorney it must be presumed that the defendant had cognizance of the attorney's acts and approved them, and he can not be heard to object that the attorney filing the plea in his behalf had no authority.<sup>3</sup>

§ 526. The provisions of the constitution and statutes of the United States have been noticed in regard to the effect of the judgment of one state in the tribunals of another. By these provisions such judgments, duly authenticated as the statute provides, are put upon the same footing as domestic judgments. But this does not prevent an inquiry into the jurisdiction of the court in which the original judgment was rendered to pronounce the judgment, nor an inquiry into the right of the state to exercise authority over the parties or the subject-matter, nor any

<sup>1</sup> *Doe v. Dixon*, 3 B. & A. 785; *Hubbard v. Phillips*, 13 M. & W. 502; *Williams v. Smith*, 1 Dowl. P. C. 62; *Murray v. Newman*, 1 Exch. 402; *Odell v. Odell*, 1 Ir. Exch. 81; *Morgan v. Thorne*, 7 M. & W. 100; *Hawbridge v. De La Croix*, 3 M. G. & S. 742; *Stanhope v. Firman*, 3 Bing. & C. 203.

<sup>2</sup> *Shelton v. Tiffin*, 6 How. 163.

<sup>3</sup> *Buckman v. Alwood*, 49 Ill. 128; *Rogers v. Burnes*, 27 Pa. St. 525; *Cybert v. McClure*, 22 Pa. St. 195; *Coxe v. Nichols*, 2 Yeates, 546; *Denton v. Noyes*, 6 Johns. 32; *Landes v. Brant*, 10 How. 348; *Field v. Gibbs*, 1 Pet. C. C. R. 155; *Reed v. Pratt*, 2 Hill. 64.

inquiry whether the judgment be founded in and impeachable for a manifest fraud. The constitution did not mean to confer any new power upon the state, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states, and they enjoy not the right of priority, or privilege, or lien, which they have in the state where they are pronounced, but that only which the *lex fori* gives to them by its own laws in the character of foreign judgments.<sup>1</sup>

§ 527. The only point that is open to litigation in an action on a judgment of another state is the jurisdiction of the court which rendered it over the cause or the parties, and when this is once proved or admitted the judgment becomes then absolutely conclusive in regard to all other matters. Parsons, C. J., said,<sup>2</sup> "the manifest design of the constitution was to give greater certainty and effect to valid judgments, not to enable the courts of one state to exercise an usurped or illegal authority over the citizens of other parts of the Union, who have not been regularly served with process or in any way made amenable to the jurisdiction of the tribunal which assumes to pass sentence against them; to give a judgment the effect accorded to it by the constitution, the court rendering it must have had jurisdiction not only of the cause but of the parties. If a foreign judgment be produced by a party to obtain the execution of it here, the jurisdiction of the court rendering it is still open to inquiry, and if a defect of jurisdiction is apparent, the party must fail without any inquiry as to its merits, and no faith or credit will be given to the judgment. A debtor living in one state may have goods, effects or credits in another where the creditor resides, and such creditor may there lawfully attach those goods, &c., pursuant to the laws of that state in the hands of the bailiff, factor, trustee or garnishee of his debtor, and on recovering judgment those goods, effects or credits may be lawfully applied to satisfy the judgment, and the bailiff, factor, trustee or garnishee, if sued in this state for those

<sup>1</sup> Savings Inst. v. Gerber, 34 N. J. R. 375.

E. 130; Claffin v. McDermott, 12 F. <sup>2</sup> Bissell v. Briggs, 9 Mass. 462.

goods, effects or credits, will be protected by that judgment. But if those goods, &c., were insufficient to satisfy the judgment, and the creditor should sue an action in this state where the debtor resides on that judgment, he must fail, because the defendant was not personally amenable to the jurisdiction of the court rendering the judgment, and if the defendant after service of process of the foreign attachment should either in person have gone into the state or constituted an attorney so as to protect his goods, &c., from the attachment he would not thereby give the court jurisdiction of his person, since the jurisdiction must result from the foreign attachment. It would be unreasonable to oblige any man living in one state, and having effects in another to make himself amenable to the courts of the last state, that he might defend his property there attached.<sup>1</sup>

§ 528. There has been of late a greater amount of judicial expression on the subject of divorces granted in sister states and in some of the territories than upon any one question connected with judgments of other states. The facilities afforded in some portions of this country for a dissolution of the marriage relation and the amount of fraud and collusion displayed in obtaining divorces has been unparalleled in the history of any civilized country. So reckless have parties connected with this disgraceful business become, as to obtain divorces for parties who have never been married, and forgery, perjury and other fraudulent devices have been frequently resorted to in order to enable a class of persons to, who could not otherwise, obtain a dissolution of the marriage relation. The result has been an apparent conflict of decisions upon the validity of such proceedings when called in question directly or collaterally. The courts of the various states proceeding on different grounds, and affording different degrees of facility for obtaining divorces, it has become quite common to go from one state to another, whose loose practice in regard to matters of this character is often perverted by false suggestion and apparent default, even without notice to the adverse party, and obtain a divorce, and they have generally been attacked on the ground of fraud.

<sup>1</sup> *Ewer v. Coffin*, 1 Cush. 23; *Phelps v. Holker*, 1 Dall. 261, *Arndt v. Arndt*, 15 Ohio, 33; *McVicker v. Beedy*, 31 Me. 316; *Castrique v. Imrie*, L. R. 4 H. L. C. 414; *Bissell v. Briggs*, 9 Mass. 462.

§ 529. Every state has the right to determine the *status*, or domestic and social condition of persons domiciled within its territory.<sup>1</sup> It may determine for itself, for what causes that *status* may be changed or affected and upon what grounds, based upon what acts or omissions of persons holding the relation to each other of marriage, they may be separated and that relation dissolved; and it may prescribe what legal proceedings shall be had to that end, and what courts of its sovereignty shall have jurisdiction of the matrimonial *status* and power to adjudge a dissolution of that relation. All citizens of that state domiciled within it, and owing to it allegiance, are bound by the laws and regulations which it prescribes in that respect. When, without infringement of the constitution of the state its statutes have conferred upon any of its courts the general power to act judicially upon the matrimonial *status* of its citizens, or persons within its territorial limits; and to adjudge a dissolution of the relation of husband and wife, such court has jurisdiction of the subject-matter of divorce. It is the act or acts which constitute the cause of action which is the subject-matter in a suit for divorce. Power given by law to a court to adjudge divorces from the ties of matrimony gives jurisdiction of the subject-matter of divorce. Though the proceedings before that court, from first to last of the testimony, in an application for divorce should show that a state of facts does not exist which makes a legal cause for divorce, yet it cannot be said that the court has not jurisdiction of the subject-matter, that it has not power to entertain the proceedings, to hear the proofs and allegations, and to determine upon their legal sufficiency and effect. Jurisdiction does not depend upon the ultimate existence of a good cause of action in the plaintiff's particular case.<sup>2</sup> A court may have jurisdiction of an action in assumpsit of that subject-matter. An action by A. in which a judgment is demanded against B. as the indorser of a promissory note, falls within that jurisdiction. Such court may entertain and try the action, and give a valid and effectual judgment in it. Though it should appear in proof that there had never been

<sup>1</sup> Cheever v. Wilson, 9 Wall. 108; 72 N. Y. 217; People v. Baker, 76 N. Barber v. Root, 10 Mass. 260; Strader v. Y. 78; Cook v. Cook, 104 Ill. 35.  
v. Graham, 10 How. 82; Kinnier v. <sup>2</sup> Groenvelt v. Burwell, 1 Ll. Kinnier, 45 N. Y. 535; Hunt v. Hunt, Raynd 466.

presentment and demand, nor notice of non payment, yet a judgment for A. against B., though against the facts, without facts to sustain it, would not be void as rendered without jurisdiction. It would be erroneous and liable to reversal on review until reviewed and reversed, it would be valid and enforceable against B. and entitled to credit when brought in play collaterally. If given by such court in a sister state against one of whose person that court had jurisdiction, it would be a judgment which the courts of another state would be bound to credit and enforce. Jurisdiction of the subject-matter, is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising or which is claimed to have arisen, under that general question. One court has jurisdiction in criminal cases; another in civil cases; each in its sphere has jurisdiction of the subject-matter. Yet the facts, the acts of the party proceeded against, may be the same in a civil case, as in a criminal case as for instance in a civil action for false and fraudulent representation and deceit, and in a criminal action for obtaining property by false pretenses. It could not be said that the court of civil powers had jurisdiction of the criminal action nor *vice versa*, though each had power to pass upon allegations of the same facts. So, that there is a more general meaning to the phrase *subject-matter* in this connection than power to act upon a particular state of facts. It is the power to act upon the general, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power. A suitor for a judgment of divorce may come into any court of the state in which he is domiciled, which is empowered to entertain a suit therefor, and to give judgment between husband and wife of a dissolution of their married state. If he does not establish a cause for divorce, jurisdiction to pronounce judgment does not leave the court. It has power to give judgment that he has not made out a case. That judgment would be so valid and effectual as to bind him thereafter, and to be *res adjudicata* as to him in another like attempt, by him. If that court should err, and give judgment that he had made out his case, jurisdiction remains in it so to do. The error is to be corrected in that very action. It may not be shown collaterally to avoid the judgment, while it

stands unreversed, whether the judgment be availed of in the state of its rendition, or a sister state; granted always that there has been jurisdiction of the parties to it. The judgment is in such case also *res adjudicata* against the party east in judgment. Jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action. "In a suit for divorce a valid judgment *in personam* so as to affect the dissolution of the marriage contract, which shall be prevalent everywhere, may be rendered against a defendant not within the territorial jurisdiction during the progress of the suit, if that be the place of his citizenship and domicile, though process be served upon him only in some method prescribed by the laws of that jurisdiction as a substitute for personal service, and though he has not voluntarily appeared."

§ 530. Jurisdiction in matters of divorce depends in general upon the domicile or residence of the parties to a marriage at the time of the commencement of the proceedings for divorce. A court of any county having jurisdiction, where the parties are then domiciled, has jurisdiction to dissolve their marriage, which is valid.<sup>1</sup> Such jurisdiction of the court in respect to such parties is not affected by the residence, allegiance, or domicile, at the time of marriage, place of marriage, or place where the offense in respect of which divorce is sought was committed. That is, a court of another State or foreign country has jurisdiction to dissolve the marriage of any parties *actually domiciled* in such State or country at the commencement of the proceedings for divorce.<sup>2</sup> It is sufficient if the petitioning party has been a

<sup>1</sup> Per Folger in *Hunt v. Hunt*, 72 N. Y. 217; *Gibbs v. Ins. Co.*, 63 N. Y. 114; *Douglass v. Forrest*, 4 Bing. 686; *Bequet v. McCarthy*, 2 B. & A. 951; *Martin v. Nichols*, 3 Sim. 458; *Schibshy v. Westenholz*, L. R. 6 Q. B. 155; *Black v. Black*, 4 Bradf. 174; *Sheldon v. Wright*, 5 N. Y. 497; *Hood v. Hood*, 11 Allen, 196; *De Graw v. De Graw*, 7 Mo. App. 121.

<sup>2</sup> *Tolen v. Tolen*, 2 Blackf. 407; *Pawling v. Bird*, 13 Johns. 192; *Vischer v. Vischer*, 12 Barb. 640; *Barber*

*v. Root*, 10 Mass. 265; *Fellows v. Fellows*, 8 N. H. 160; *Huding v. Allen*, 9 Me. 148.

<sup>3</sup> *Shaw v. Gould*, L. R. 3 H. L. 55; *Pitt v. Pitt*, 4 Man. 641; *De puy v. Robins*, 7 H. L. C. 380; *Chesley v. Wilson*, 9 Wall. 124; *Standridge v. Standridge*, 31 Ga. 223; *White v. White*, 5 N. H. 476; *State v. Fry*, 4 Mo. 120; *Dorsey v. Dorsey*, 7 Watts. 329; *Tolen v. Tolen*, 2 Blackf. 407; *Harteau v. Harteau*, 14 Ark. 181; *Pawling v. Bird*, 13 Johns. 192; *Harding v. Allen*, 9 Me. 140; *Pomeroy v.*

*bona fide* resident of the State where the action is brought.<sup>1</sup> The ground upon which the validity of such decrees is maintained, is, that marriage, being a relation involving the social *status* of a party to it, the State of which the complaining party is a *bona fide* resident, has the right to determine his matrimonial *status*; and, in view of the new relations that may be formed in consequence of the dissolution of the marriage, in the State where the decree is pronounced, that public policy requires the recognition of the validity of such decrees in other States. Thus, a divorcee decreed in a foreign State, according to the laws thereof, where a husband removes to that State and acquires a domicile there, without intending to commence proceedings for a divorce against a wife who is living apart from him without justifiable cause, but afterwards commences such proceedings, after leaving a summons at the last and usual place of abode of the wife, and giving notice of pendency of proceedings in the State of his domicile, by publication in the papers of that State, obtains a decree, such decree is valid and effectual.<sup>2</sup>

§ 531. The doctrine established that the judgment of a court of one State has no binding effect in another, unless the court had jurisdiction of the subject matter, and of the persons of the parties, and that want of jurisdiction is a matter which may always be interposed against a judgment when sought to be enforced, or when any benefit is claimed under it, and that the want of such jurisdiction renders a judgment a nullity, has been given full force and effect in cases where foreign decrees of divorce have been sought to be made available in criminal prosecutions, and also in civil actions. In cases of foreign divorcees, if the record contains a recital that the parties were residents of such State, such recital, like that in ordinary judgments of jurisdictional facts may be contradicted, and the party convicted of bigamy in the State of his residence, if he contract another marriage there.<sup>3</sup> So, where a husband not having a domicile in

Wells, 8 Paige, 100; Fellows v. Fellows, 8 N. H. 100; Brodie v. Brodie, 2 Sw. & Tr. 259.

<sup>1</sup> Cooper v. Cooper, 7 Ohio, 504; Mansfield v. McIntire, 10 Ohio, 27; Burien v. Shannon, 115 Mass. 438; Harding v. Abden, 9 Me. 140; Ditson

v. Ditson, 4 R. I. 87; Tolen v. Tolen, 2 Blackf. 407; Thompson v. The State, 28 Ala. 13; Gleason v. Gleason, 4 Wis. 64.

<sup>2</sup> Burken v. Shannon, 115 Mass. 438.

<sup>3</sup> People v. Darnall, 25 Mich. 247; Davis v. Commonwealth, 13 Bush.

another State goes thither solely to obtain a divorce, and does there fraudulently obtain a divorce for a cause that occurred in, but was not a cause therefor, by the law of his domicile, the decree, not being of a court having jurisdiction, is not entitled to faith and credit in the State of his domicile, even though it recites facts sufficient to give it jurisdiction.<sup>1</sup> Thus, a judgment of divorce granted in another State, under laws requiring a year's residence on the part of the plaintiff before suing, as a condition of jurisdiction, may be impeached, when produced in evidence in another proceeding in the courts of a sister State, notwithstanding the record alleges the necessary residence, and shows an appearance by an attorney at law for the defendant, by proof that the plaintiff never was a resident of the State in which the divorce was obtained, and that the appearance for the defendant was entered without authority.<sup>2</sup> The court of errors and appeals in New Jersey have, in a late case, declared a rule which goes farther than any decision yet given, and in cases where the decree is one of divorce, it seems to be one founded on every principle of morality and justice. This case was one where the parties were married in that State, but from the day of their marriage there was no intercourse or communication between the parties. The husband, soon after the marriage, went to Illinois, and after sufficient residence there to give the court jurisdiction, applied for and obtained a decree of divorce, on the ground of fraud and duress, and want of consent of the husband to the marriage. The wife was in New Jersey, her residence was known to the plaintiff;

318; Sewall v. Sewall, 122 Mass. 156; Baker's Will, 2 Red. N. Y. 179, People v. Baker, 76 N. Y. 78.

<sup>1</sup> Whitecomb v. Whitecomb, 46 Iowa, 437; Edson v. Edson, 108 Mass. 390, Sewall v. Sewall, 122 Mass. 156, Irby v. Wilson, 1 D. & B. Eq. 578; Van Fossen v. State, 37 Ohio St. 317; S. C., 41 Am. R. 507; Gettys v. Gettys, 3 Lea, 260; Colvin v. Reed, 55 Pa. St. 416; Reed v. Elder, 62 Pa. St. 308; Commonwealth v. Blood, 97 Mass. 338; Hoffman v. Hoffman, 58 Barb. 9; Strait v. Strait, 3 McArthur, 415; Morey v. Morey, 27 Minn. 267; Dorsey v. Dorsey, 7 Watts, 310;

Edwards v. Green, 9 La. Ann. 317; Lyon v. Lyon, 2 Gray, 367; Marnie v. Maguire, 7 Dana, 181; Hancock v. Turner, 14 Miss. 227; Cox v. Cox, 19 Ohio, 502; Thompson v. State, 28 Va. 12; Hull v. Hull, 2 Str. & 311; Adams v. Adams, 51 N. H. 88; Platt's Appeal, 80 Pa. St. 601; Holmes v. Holmes, 63 Me. 129; Graves v. Graves, 36 Iowa, 310; Leitch v. Leitch, 39 N. H. 20; Doughty v. Doughty, 29 N. J. Eq. 581; Kerr v. Kerr, 41 N. Y. 272; Borden v. Fitch, 15 Johns. 131; Vischer v. Vischer, 12 Barb. 640.

<sup>2</sup> Kerr v. Kerr, 41 N. Y. 272.

iff, but no notice given her other than by publication, and this did not correctly state the name of the defendant. The court say, that upon the cause of action, as set forth in the record, in the Illinois case, there could have been no divorce, for there was no marriage, no *status*. If the proof was responsive to the bill, the essential element, that of consent, was lacking. But the true ground upon which the decree was declared void, as to the wife, was stated by the Vice-Chancellor, whose decree was unanimously affirmed: "A judgment of a court of one State, granting a divorce to a husband, whose wife is domiciled in another State, will not be entitled to recognition by the courts of the latter State, if the husband could have given to the wife actual notice of the suit for divorce, but refused or neglected to do so. And, where the evidence on which such a judgment purports to be founded appears to be fabricated, a court of equity of another State may grant relief to the wife against it as void. The right to have a fair opportunity (such as the defendant can make effectual to his protection) to make defense against any charge is secured by a rule of general law, resting upon a principle of natural justice. A judicial sentence pronounced in violation of this right is not within the protection of the Constitution, nor entitled to general recognition as valid. Judgments dissolving the marriage relation have been repeatedly declared void for a violation of this right."

"The validity of judgments of divorce in all jurisdictions, although pronounced without actual notice to the defendant, where it was in the power of the plaintiff to give it, cannot be sustained on the ground that such suits are proceedings *in rem*, and, therefore, notice is not necessary. A proceeding *in rem* is a proceeding against tangible property; and actual notice is dispensed with, on the theory that the owner is bound to know where his property is, and what is being done with it. It is manifest that this theory cannot be applied to the relation of husband and wife, especially where one abandons the other, and refuses all intercourse."

The Chief Justice, speaking for the court, in affirming this decision, says, "that a judgment can carry with it, *per se*, no

<sup>1</sup> Cases cited in note 2.

315; S. C., affirmed, 28 N. J. Eq.

<sup>2</sup> *Doughty v. Doughty*, 27 N. J. Eq. 531.

extra-territorial force when the jurisdiction in the case rests alone on the fact that the complainant has his domicile within such jurisdiction. All the claim which such an adjudication has to foreign recognition, rests on the ground of comity. *It is not a judgment such as is entitled to recognition and enforcement in other States by force of the act of Congress, and the Constitution of the United States. It is only judgments that ensue from jurisdictions, regularly obtained over the parties by service of process upon them, or by a voluntary appearance, or when the proceeding is strictly in rem, that carry with them these high sanctions, and which therefore are everywhere conclusive. Jurisdiction in divorce suits, arising out of the status and domicile of one of the parties cannot impart to a judgment any such efficiency.* Nevertheless, as marriage is a matter of universal recognition and interest among all civilized people, a judgment of divorce, resting even on such a contracted foundation as the domicile of one of the parties alone, bears with it, into other jurisdictions a title to respect, and, in some cases, a claim to voluntary adoption. In such instances, the question whether the judgment shall be extra-territorially enforced, is one resting entirely upon the consideration that, in a matter of universal interest of this nature, an obligation rests upon every government to carry into effect, as far as is reasonably practicable, and as may be consistent with its own policy, all foreign judgments. But an appeal of this kind to inter-State comity should *never prevail when the judgment sought to be accredited has been rendered in violation of that fundamental axiom of justice, that the parties, before their rights are adjudged, shall have an opportunity of being heard.* A judgment of divorce proceeding from a jurisdiction founded on domicile, would not contravene essential rules of natural justice if actual notice to appear had been served on the defendant residing abroad. It is true that a notice so served on a litigant out of the jurisdiction in which a suit is pending, may add nothing to the judicial right to take cognizance over the cause, but, nevertheless, it may impart a quality to the resulting judgment that will serve as a credential to it in a foreign jurisdiction. In this case the judgment rendered in the court of the State of Illinois is entirely destitute of those properties that entitle it to extra-territorial acceptance; the

residence of the defendant to it was known, she was not summoned, she did not appear, she was not served with process, nor was notice given to her." That this is the only feasible and safe doctrine in questions of this character can not be doubted. There can be no question but that a divorce granted by a court of a foreign State, where the parties to a suit are domiciled in different jurisdictions, and the plaintiff does not know, and cannot by diligent inquiry ascertain the abode of the defendant, and cannot, therefore, give actual notice of his suit, would, under such circumstances, be valid in every other State. The doctrine above stated, therefore, would not apply, but it is in those cases where the plaintiff, knowing the abode of the defendant, willfully conceals the pendency of the action from such defendant, and gives notice by publication in some obscure sheet for the purpose of diminishing the risk of publication, and yet be sufficient to give jurisdiction to the court.

§ 532. In a late case,<sup>1</sup> involving the question as to the validity of divorce of this kind, the court said: "A divorce granted in another State, against a citizen of this State, domiciled and actually abiding here throughout the pendency of the proceedings there, without appearance or actual notice, is of no effect in this State."<sup>2</sup> Although a State may adjudge the *status* of its citizen toward a non-resident, and authorize such judicial proceedings as it sees fit, such proceedings have no extra-territorial force. The proceeding is neither *in rem* nor *quasi in rem*, so as to bind a citizen of another State not notified or appearing.<sup>3</sup> A judgment *in rem* is not usually ground for proceeding *in personam* in another jurisdiction.<sup>4</sup> Nor will effect be given to such a judgment on the principle of comity of States, for the reason that at the time of the rendition of the judgment our own statute provided for divorce against a non-resident by a like substituted service.<sup>5</sup>

<sup>1</sup> *People v. Baker*, 76 N. Y. 78.

<sup>2</sup> *Borlen v. Fitch*, 15 Johns 121; *Bradshaw v. Heath*, 13 Wend. 407; *Vischer v. Vischer*, 12 Barb. 649; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30; *Killbuck v. Woodworth*, 5 Johns. 37; *Shumway v. Stillman*, 4 Cow. 294; *Ferguson v.*

*Crawford*, 70 N. Y. 253 (*Kinnier v. Kinnier*, 45 N. Y. 535 and *Hunt v. Hunt*, 72 N. Y. 217, distinguished).

<sup>3</sup> *Woodworth v. Spring*, 4 Allen, 321.

<sup>4</sup> *Pauling v. Bird*, 18 Johns. 192.

<sup>5</sup> *People v. Baker*. Opinion by Folger, J., 76 N. Y. 78.

§ 533. Upon a close and careful examination of the able argument of Folger, J., in delivering the opinion of the court in the case of *People v. Baker*,<sup>1</sup> "It would seem to be unassailable and based upon grounds too conclusive to be doubted, let alone controverted. It must, however, be looked at from a standpoint based upon facts and not upon theory. Let us state an everyday case: A husband or wife desirous of dissolving the marriage relation for causes not available in the domicile of their residence, one or the other abandons their home and the relations heretofore existing between them; that party goes to another State and there becomes a *bona fide* resident; he becomes amenable to its laws and entitled to its privileges, one of these is the obtaining of a divorce upon the statutory ground afforded by the law-making power of the State in which he has become a citizen. In accordance with these laws he obtains a divorce declaring the marriage relation between him and his wife absolutely dissolved. He thereafter enters into a new contract of marriage and new family relations and new ties spring up. By the laws of the State of which he has become a resident his former wife has no claim of any kind upon him, nor can she assert any, in the forms of that State. But whenever the former husband returns to the State of New York, under the decision in this case, he finds that the decree of divorce he obtained is absolutely void, and he has a wife living there with whom he can enforce his marital rights, and thus beget another family, who in the State of his residence are regarded as illegitimate. It must be apparent that the beautiful theory, so logically described by Judge Folger, when applied to stern facts would be conducive of greater lawlessness, more immorality, and with effects so pernicious as to shock the conscience of any court. In almost every case where questions arising from the effects of foreign divorces have been the basis of criminal prosecution, it has been done at the instance of the party to the marriage contract who has been thus abandoned by the party procuring the divorce, and while unwilling to further continue a contract which has been declared by a judicial tribunal to be dissolved, usually seeks revenge in a criminal prosecution, no other means of redress being available. Upon the facts in the case of *People v. Baker*, *supra*, which are briefly

<sup>1</sup> 76 N. Y. 78.

these: "The defendant, Frank M. Baker, was convicted of bigamy in 1877. It appeared that, in 1871, Baker was married in Ohio to one Sally West, with whom he lived for a few years, presumably in New York, as the case seems to have been tried on the assumption that he was domiciled here, though it was subsequently held that his place of domicile was not established. His wife returned to Ohio at some time previous to March 30, 1874, and on that day, as it appeared by the record, filed a petition in the Court of Common Pleas of the County of Seneca, in the State of Ohio, for a divorce from her husband, on account of gross neglect of duty. Such divorce was granted, and it was undisputed that it was regularly obtained in accordance with the laws of Ohio. Baker was not in the State of Ohio at the time, and no notice was served on him except by publication, which was duly made according to the Ohio statutes. Shortly after the decree was obtained Baker had actual notice of the proceedings, as appeared from a letter produced in evidence by him, from his former wife to his mother, dated July 7, 1874, in which she states that she had obtained a divorce two weeks before that time. November 14, 1874, Baker married again in New York. July 1874, Sally married a man by the name of Murray in the State of Ohio, and thereafter lived with him as her lawful husband; but this was excluded by the court. The plaintiff in the divorce suit was at the time of her marriage a resident of Ohio, she had always lived there, except during the brief period when she resided in this State; that she returned there for the purpose of remaining with her relatives until the birth of her child; that she remained there for more than two years waiting for her husband; that he did not during this time return or send her any word or message, and she did not know his whereabouts, nor did he contribute anything for her support."

§ 534. Suppose that after the wife had obtained her decree of divorce, and entered into a new and valid marriage contract in the State of Ohio, which she did; the husband being a citizen (by this decision) of New York, had applied for a divorce, as he might have done in accordance with this decision, upon the ground of adultery, committed in Ohio (which by the laws of Ohio and the decree of divorce their obtained was absolutely false), and the court in New York had decreed the husband a

divorce on this ground, we would see what would seem unparalleled, a married woman legally divorced in conformity with the laws of the State having lawful jurisdiction over her status, which the Court of Appeals in this very case concede to the State of Ohio, and which jurisdiction the same court maintains it has in similar cases over its citizens; and after such legal divorce in the State of Ohio, a lawful marriage in that State declared void, and the lawful wife decreed to be guilty of adultery in living with her own husband, and this when the New York court had no jurisdiction over the wife or her subsequent husband. Or, suppose that the wife had been indicted for bigamy in the State of New York, can it be for a moment thought that under the facts in this case the State of Ohio would have surrendered her to the authorities of the State of New York for trial? Had the husband applied for the divorce in the State of New York upon the ground above mentioned, service upon the wife could not have been other than constructive, precisely the same service that under the laws of the State of Ohio that was obtained against the husband in the proceedings in that State; and in each State there would be a decree of divorce, or rather two decrees between the same parties, dissolving the same marriage relations, one upon the ground of desertion on the part of the husband, the other on the ground of adultery of the wife; and each State maintaining that its decree was the only real one. That this alleged conflict is not overdrawn must be apparent upon reading the facts in the case and the decision of the Court of Appeals thereon. There was no evidence in this case, nor was it claimed that the wife, when she returned to her original domicile in Ohio, went there for the purpose of obtaining a divorce, or that she subsequently returned to New York. It was admitted that for two years her husband had failed to contribute to her support, and that she did not know of his whereabouts. That she had a right to a separate domicile has been effectually settled by the Supreme Court of the United States in a case of this kind. In an earlier case in the same State,<sup>1</sup> a very carefully considered one it was said, both parties went to a foreign State to procure a divorce; and it is further said "that the parties subsequently, by collusion, procured to be entered and docketed a formal decree

<sup>1</sup> *Kinnier v. Kinner*, 45 N. Y. 535.

of divorce, by which the parties were declared absolutely divorced." Church, C. J., in delivering the opinion of the court, said "the court had jurisdiction of the subject-matter of the action; that is, *it had jurisdiction to decree divorces according to the laws of that State; and every State has the right to determine for itself the grounds upon which it will dissolve the marriage relation of those within its jurisdiction.*" The court also had jurisdiction of the parties by the appearance of the defendant." And also held that if there was any fraud connected with the decree, it was not such as would invalidate it, as both parties are equally guilty of such fraud. Yet here is a case where the parties, without renouncing their allegiance by permanently removing from the State of New York, and obtaining a domicile in another but temporarily, go into another State and ask the courts of that State to determine the status of citizens of the State of New York and dissolve their marriage relation, which the same court in the Baker case say cannot be done, as the court of another State has no jurisdiction over the status of the citizens of the State of New York; and in the case last cited the decree is held valid, notwithstanding it was procured by fraud and collusion, because the parties were in *pari delicto*, and in the Baker case, where there was no fraud, it was void. If, as the Court of Appeals state in both of these cases, "every State has the right to determine for itself the grounds upon which it will dissolve the marriage relation of those within its jurisdiction," is sound law and it has never been questioned, it is difficult to see how a tribunal like that of the ability of the Court of Appeals can continually enunciate this maxim and yet refuse to give it effect.

§ 535. Sound morality, public policy, the legitimacy of innocent off-spring, demand that a principle of law be declared by all courts, which seems to be founded on principles of justice, namely, that where either husband or wife abandons the other and seeks or obtains a *bona fide* residence in another State, and after the statutory time expires, essential to the jurisdiction of a court in this class of cases, and a decree of divorce is granted, without the jurisdiction of the court being imposed upon, and the party remains in the State wherein he has obtained the decree, that no matter whether the other party appeared or not, such decree, if *constructive notice was duly given*, should be held

conclusive in every State in the Union wherein it is brought in question. And we think that the construction given to the decrees of this nature, as *quasi decrees in rem*, acting not on the person, but on the *status* as created by the contract, is the principle the true solution of this question; like a judgment *in rem*, it operates only on the *res*, the marriage contract. The decree is not party, or the one against whom the divorce is obtained, who, under the theory in the case above cited, certainly occupies an anomalous position in the State of his or her residence; the marriage contract, by reason of its validity, *i. e.*, that is, never having been legally dissolved, could enforce it, while in the State where the divorce was granted the party would be remissus, and we should have a conflict between the courts of different States under the same government. But where a party with fraudulent intent and with a specific object of obtaining a decree of divorce abandon his residence temporarily or for sufficient time to make a *prima facie* case of citizenship, imposes upon the jurisdiction of the court and obtains a decree of divorce, and then returns to his former domicile and continues to reside there, thus showing the evasive purposes and fraudulent intent, we think that the maxim that "One cannot do indirectly that which he cannot do directly" applies, and that such decree of divorce should not only be held fraudulent in the State where granted, but in every other State. And we think that, with few exceptions, the modern cases sustain these principles. Thus, where husband and wife are citizens and resident of one State, and he or she goes into another State temporarily for the purpose of procuring a divorce, such divorce is void in the State in which the parties have a domicile.<sup>1</sup> If the courts of one State or foreign country

<sup>1</sup> Hanover v. Turner, 14 Mass. 227; Borden v. Shannon, 115 Mass. 417; Sewall v. Sewall, 122 Mass. 156; Clark v. Clark, 8 Cush. 385; Lyon v. Lyon, 2 Gray, 367; Chase v. Chase, 6 Gray, 157; Smith v. Smith, 13 Gray, 260; Ditson v. Ditson, 4 R. I. 87; Barber v. Root, 10 Mass. 260; Dorsey v. Dorsey, 7 Watts, 349; Maguire v. Maguire, 7 Dana, 181; Hull v. Hull, 2 Strobb. Eq. 174; Edwards v. Green, 9 La. An. 317; Irby v. Wilson, 1 D. & B. Eq. 558;

Borden v. Fitch, 17 Mich. 421; Bradshaw v. Hatch, 13 Mich. 347; Vischer v. Vischer, 12 Barb. 600; Hoffman v. Hoffman, 19 N. Y. 19; Kerr v. Kerr, 41 N. Y. 271; Donahy v. Donahy, 27 N. J. Eq. 315; Gattys v. Gattys, 3 Lea, 290; Van Dusen v. State, 37 Ohio St. 317; S. C., 41 Am. R. 507; Mellen v. Mellen, 10 Abb. N. Cas. 329; Graves v. Graves, 30 Iowa, 310; Adams v. Adams, 51 N. H. 558; Edson v. Edson, 108 Mass. 590,

permit a party having a domicile in another State or nation to resort to it for the purpose only of getting rid of the personal *status* and obligations of husband and wife, which release they cannot obtain in the tribunals of their own residence, it is evident that such State or country is, in reality, by its tribunals, usurping the rights and functions of sovereignty over the subjects of another, who still retain, and, as soon as their purpose is accomplished, intend to return to the State of their original domicile, and resume their original positions. A divorce so obtained is void, and is the result of a fraudulent imposition of jurisdiction upon the court granting it.

§ 536. And in a late case in Illinois it is said: "Ordinarily when a person, upon a change of domicile, goes into another State or country, the personal *status* which he carries with him will be recognized by the courts of the latter country; but this rule is subject to certain exceptions. If, for instance, such *status* has been acquired by a violation of an express provision of the positive law of the State in which its recognition is asked, or if it be contrary to the spirit and genius of its institutions, as a title of nobility would be here, or if it is opposed to its settled policy, or to the good order and well being of society, or to public morality and decency, in all such cases the *status* will not be recognized by the courts of the latter State. Where the court of a foreign country has jurisdiction of the parties and subject matter of a suit, and this affirmatively appears, its judgment or decree will be conclusive on the parties, their legal representatives and privies, in all countries where the matters litigated are again drawn in question, and this is particularly so with respect to judgments or decrees affecting the *status* of a person, they being in the nature of judgments *in rem*, which are binding on the whole world.

"The limitation of this rule is that it may be shown such judgment or decree was obtained by means of fraud, or gross abuse of the process of the court, or flagrant departure from the ordinary course of judicial procedure, as, for instance, that a party in interest sat as a judge in the cause.<sup>1</sup>

Holmes v. Holmes, 63 Me. 420; Whitcomb v. Whitcomb, 46 Iowa, 437; Strait v. Strait, 3 McArthur, 415;

People v. Baker, 76 N. Y. 78; Ferguson v. Crawford, 70 N. Y. 253.

<sup>1</sup> Roth v. Roth, 104 Ill. 85.

§ 537. The Supreme Court of Wisconsin in a late case say: "Although marriage is a *status*, and every State has the right to fix, regulate and control the same, as to every person within its jurisdiction, even though one of the parties may at the time actually reside in another State, yet a judgment of divorce granted in another State, under statutes making jurisdiction dependent entirely upon the residence there of the party applying for a divorce, at the suit of a husband against a wife, who resided in this State, and who was not personally served with notice and did not appear in the action, but was ignorant of its pendency until after the judgment was rendered, is not a bar to a subsequent action by such wife in this State for a divorce, alimony, allowance and a division of the property of such husband situated within this State, especially where such foreign judgment was based upon an alleged cause of action which was false in fact."<sup>1</sup>

§ 538. The divorce business having become somewhat profitable, it was natural that there should be a desire to extend it; the statutory causes for divorce, and the fact that no respectable court of the domicile of the parties would grant a decree without sufficient proof, soon led unscrupulous parties to seek other jurisdictions, where the defendant would have no knowledge of the proceeding, and courts were not over particular. It was soon discovered that the Territory of Utah afforded the best field for their operations, under a law containing the following novel provision: "That the probate courts of such territory should have jurisdiction to grant divorces *to such parties as desired to become residents of Utah.*" This was construed to mean citizens of other States and nations. This provision soon gave the probate courts of that Territory sufficient business, until the party obtaining its decree was prosecuted for bigamy, adultery, etc., after entering into a new marriage, the ground of criminal prosecution being that the Utah divorce, being fraudulent and void, did not dissolve a marriage contract between parties who were not actually domiciled there at the time. The defendant would plead his divorce, and in a leading case on this class of divorces the court thus clearly treats the matter:

<sup>1</sup> Cook v. Cook, 56 Wis. 195.

"The next question arising in the case is this: Is the divorce granted in Utah valid?

"It is valid if the court granting it had full jurisdiction. Had it? It appears by the record that the divorce was granted in a suit between two parties, neither of whom was at the time of the proceedings a resident of Utah, or within the boundaries of the Territory, or had previously been, but both of whom were residents and citizens of a State in the Union. Such being the case, neither of the parties had placed himself or herself under the jurisdiction of Utah. It is well established that the court in Utah had, and could have, no jurisdiction to grant the divorce in question, and that the same is inoperative and utterly void.

"This is a question to be decided by the *jus gentium*, the law of nations, the first principles of which are, that all nations in respect to rights, are equal, and that each is sovereign within its own territory, with jurisdiction over the persons and property therein.<sup>1</sup> Hood, when the divorce in question was granted, was within and under the jurisdiction of a State other than Utah. It is further settled that the States of the Union, as between themselves, are sovereign. In determining that question of jurisdiction, therefore we have only to inquire what jurisdiction the State of Indiana has over the people and property within the Territory of Utah; for on this point the States and Territories are severally equal. What jurisdiction Illinois can exercise over residents and property in Indiana, Indiana can exercise over residents and property in Illinois. To place the matter in another light, a State may authorize divorces to be granted by legislative acts. Suppose then, that the Legislature of Utah had granted this divorce, neither of the parties being citizens or inhabitants of the territory, severing a domestic relation between two citizens of and residents of Indiana, would any one claim that the divorce would be valid? If it would be, then it follows that the State of Indiana can confer upon her Legislature power to divorce by statutory enactment husbands and wives citizens and residents of Utah, or Illinois, or Ohio. And if so, what becomes of the doctrine of sovereignty of States and nations within their own respective territories? And if the Legislature of Utah cannot grant divorces to residents and

<sup>1</sup> 1 Kent Comm. 21.

citizens of foreign States it cannot confer such powers upon the judiciary of the State. Certainly, as a general proposition, States and nations cannot exercise such extra-territorial jurisdiction. But we need not enlarge upon these established elementary principles. The case before us is too plain to admit of argument. It is shortly this: Hood desired to obtain a divorce from his wife. Neither of the parties were under the jurisdiction of Utah; the petition of Hood and the decree of divorce expressly stated this fact. If he was not a citizen and resident of Utah, he was of some other State or nation. Still the court of Utah grants a divorce to a man who informs it in his application that he is under the jurisdiction of a State other than the Territory of Utah, and that he is not subject to hers. The divorce manifestly was granted in violation of the sovereignty and jurisdiction of another State, and in violation of the plainest principles of international and constitutional law. The provision of the statute of Utah authorizing her courts to grant divorces to citizens of foreign States and nations *who were not, but desired to become residents of Utah*, was *ultra vires* and void.

"No plainer or more palpable case of the exercise of extra-territorial jurisdiction could exist. Hood was not only not a citizen or resident of the Territory, but he did not personally enter the Territory so as to give it jurisdiction over him for temporary police purposes.

"We cite on the question of jurisdiction the following cases in our own State and the cases referred to in them.<sup>1</sup>

"Nor is the decree of divorce in this case within the operation of that clause of the constitution of the United States which declares that 'full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other state.'<sup>2</sup> That clause does not include judgments and decrees which severally show upon their face that the court rendering them had no jurisdiction in the premises.<sup>3</sup>

"To avoid misconstruction, we wish it to be borne in mind that the record of the suit in the Territory of Utah in question in this

<sup>1</sup> *Sturgis v. Fay*, 16 Ind. 429; *Railroad Co. v. Hunt*, 20 Ind. 457; *Beard v. Beard*, 21 Ind. 321; *Constitution of Indiana*, Article 14.

<sup>2</sup> Const. U. S. art. 4, § 1.

<sup>3</sup> *Waltz v. Donway*, 25 Ind. 380; *Cooley Const. Lim.* 2. ed. p. 14.

case was not upon an ordinary simple contract between parties who could make and rescind such contract at pleasure, but it was suit to sever the bonds of matrimony between the parties in that suit; to dissolve a relation into which the parties could enter only in accordance with the law of the State, and which could not be dissolved by acts of the parties, but only by permission of the State having at the time jurisdiction over one or both of them. 'Marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity.' It is a status, of domestic relation resulting from a consummated contract to marry.<sup>1</sup> It is to a proceeding to dissolve such a relation, that what is said in this case applies. To give jurisdiction in a divorce suit the plaintiff, the petitioning party, must be a resident of the State or Territory where the divorce is obtained. This fact gives jurisdiction of said person and renders the divorce (notice by publication, or otherwise, having been given to the defendant) valid as to the plaintiff; and being valid as to one, public policy demands that it should be valid as to both parties.<sup>2</sup> In another case upon the same kind of a decree the court say: To each State belongs the exclusive right and power of determining upon the status of its resident and domiciled citizens and subjects, in respect to the question of marriage and divorce, and no other State, nor its judicial tribunals, can acquire any lawful jurisdiction to interfere in such matters between any such subjects, when neither of them has become *bona fide* domiciled within its limits, and any judgment rendered by any such tribunal, under such circumstances, is an absolute nullity.<sup>3</sup> It does not appear upon the face of the judgment or decree, or in any of its recitals, that either of the parties was ever resident of said Territory of Utah, or domiciled therein. This is a jurisdictional matter which should appear to entitle the judgment to any respect whatever; for though it be conceded that the probate court that rendered the judgment

<sup>1</sup> Noel v. Ewing, 9 Ind. 37; Ditson v. Ditson, 4 R. I. 87; People v. Darnell, 25 Mich. 247.

<sup>2</sup> Hood v. State, 56 Ind. 263; Litowich v. Litowich, 19 Kas. 451; People v. Smith, 20 N. Y. Supreme Ct. 414; Doughty v. Doughty, 28 N. J. Eq.

581; Davis v. Commonwealth, 13 Bush, 318; State v. Armington, 25 Minn. 29.

<sup>3</sup> Ditson v. Ditson, 4 R. I. 93; Kerr v. Kerr, 41 N. Y. 272; Hoffman v. Hoffman, 46 N. Y. 30; Hanover v. Turner, 14 Mass. 227.

was in the legal sense a court of record, 'its jurisdiction,' if any, under the local laws of the Territory 'over the subject of divorce, was a special authority not recognized by the common law, and its proceedings in relation to it stand upon the same footing with those of courts of limited and inferior jurisdiction,' unaided by any legal presumption in their favor.<sup>1</sup> If the pretended decree of divorce upon which he relied was in fact illegal and void because made by a court having no jurisdiction, it afforded him no protection against the consequence of a second marriage, whatever may have been his motive or his belief, in respect to the validity of the decree. His mistake or ignorance, if any, was one of law and not of fact. His case, therefore, is one to which the maxim '*ignorantia juris non excusat*' applies. Being, together with his lawful wife, a resident citizen domiciled in this State and subject to its laws, he was bound to know that the tribunals of no other State or Territory could rightfully take cognizance and jurisdiction over their marital relations for the purpose of decreeing their dissolution; neither could they acquire such jurisdiction through any act of the plaintiff in temporarily changing his domicile."<sup>2</sup>

§ 539. The English doctrine is declared to be "That if a decree of divorce be considered as a judgment on *status*, which is probably the most correct way of regarding it, there can be no doubt that its validity, if recognized at all, will be recognised in suits other than those between the former husband and wife. Thus, the validity of a Scotch divorce was examined by the House of Lords in a suit brought by the children of a second marriage of the mother; and if it had been held that the Scotch court had had jurisdiction to pronounce it, there can be no doubt that it would have been accepted as conclusive. Sentences of divorce, indeed, are oftenest called into question to prove or disprove the legitimacy of certain persons descended from one of the divorced pair.

"If the court, which decree the divorce, has jurisdiction to make such a decree, according to the estimate formed by English law of that jurisdiction, such a foreign judgment will receive full

<sup>1</sup> Commonwealth v. Blood, 97 Mass. 38. and held a conviction for bigamy valid.

<sup>2</sup> State v. Armington, 25 Minn. 29;

recognition here as conclusive and binding, whether in a suit between the same parties or between strangers to the original decree. Judgments upon the *status* of a person are, in fact, regarded as closely akin of judgment upon the *status* or ownership of a thing.

"The rule," says Erle, C. J., "making the decision of the court which creates the *status* of a person or thing conclusive upon all persons as to the existence of that *status*, has been regarded as salutary. Sentences of nullity of marriages in the Ecclesiastical courts, of forfeiture in the Exchequer, of settlement of paupers by the quarter sessions, and of prize in prize courts, are examples." The word "creates," as used by Erle, C. J., in the passage quoted, must of course be taken to include the essential requisite of jurisdiction, without which there would be no creation which a foreign court would recognise, either of *status* in such an action as is there referred to, or of a right and obligation in an action *in personam*.<sup>1</sup> The English courts will recognize as valid the decision of a competent foreign Christian tribunal dissolving the marriage between a domiciled native in the country where such tribunal has jurisdiction, and an English woman, when the decree of divorce is not impeached by any species of collusion or fraud. And this, although the marriage may have been solemnized in England, and may have been dissolved for a cause which would not have been sufficient to obtain a divorce in England. When an English woman marries a domiciled foreigner, the marriage is constituted according to the *lex loci contractus*; but she takes his domicile, and is subject to his law. Thus, a domiciled Scotchman married in England an English woman. Immediately after the ceremony the married couple went to Scotland, and resided there as their matrimonial home. Two years after, the wife obtained in Scotland a divorce *a vinculo matrimonii*, on the ground of her husband's adultery only. The husband came to England and married there another English woman, the first wife being still alive. In a suit for a declaration of the nullity of the first marriage at the instance of

<sup>1</sup> Shaw v. Gould, L. R. 3 H. L. 55; C. B. (N. S.) 791; Roach v. Garvan, 1 Shaw v. Attorney-General, L. R. 2 P. Ves. 157; Kenney v. Cassilis, 2 Swanst. & D. 156; Daglioni v. Crispin, L. R. 318; Dolphin v. Robbins, 3 Macq. 1 H. L. 301; Hobbs v. Hemming, 17 536.

the second wife,—*Held*, that the divorce in Scotland was a sentence of a court of competent jurisdiction, not only effectual within that jurisdiction but entitled to recognition in the courts of this country also.

§ 540. The United States Supreme Court, whose decisions upon questions affecting judgments of sister States are final and conclusive, have as yet not been called upon to decide as to the validity of divorces obtained by one of the parties to the marriage, in a State where such party is a *bona fide* resident and the other is a citizen of another State, and the divorce is decreed in accordance with the laws of the State upon constructive service to the non-resident defendant. But in the leading case in that court,<sup>1</sup> Mr. Justice Swayne in delivering its opinion said: "The petition laid the proper foundation for the subsequent proceedings. It warranted the exercise of the authority which was invoked. It contained all the requisite averments. The court was the proper one before which to bring the case. It had jurisdiction of the parties and the subject matter. The decree was valid and effectual according to the law and adjudication in Indiana.<sup>2</sup> The constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana.<sup>3</sup> It is said that the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence, and the change of domicile.<sup>4</sup> That she did reside in the county where the petition is filed, is expressly found by the decree. Whether this finding is conclusive, or only *prima facie* sufficient, is a point on which the authorities are not in harmony.<sup>5</sup> We do not deem it necessary to express any opinion on this point. The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found on the record. Giving to what there is the

<sup>1</sup> Harvey v. Farnie, 8 App. Cas. 43.

<sup>2</sup> Cheever v. Wilson, 9 Wall. 108; Christmas v. Russell, 5 Wall. 290; Darcy v. Ketchum, 11 How. 175.

<sup>3</sup> McQuigg v. McQuigg, 13 Ind. 294; Noel v. Ewing, 9 Ind. 37; Lewis v. Lewis, 9 Ind. 105; Rourke v. Rourke, 8 Ind. 427; Tolen v. Tolen, 2 Blackf. 740; Wilcox v. Wilcox, 10 Ind. 436.

<sup>4</sup> Darcy v. Ketchum, 11 How. 175, Const. art. 4, sec. 1; 1 Stat. at Large, 122; Christmas v. Russell, 5 Wall. 290; Mills v. Duryee, 7 Cranch, 483.

<sup>5</sup> Case v. Clarke, 5 Mason, 70; McDonald v. Smalley, 1 Pet. 620; Cooper v. Galbraith, 3 W. C. C. 596.

<sup>6</sup> Noyes v. Butler, 6 Barb. 613; Hall v. Williams, 6 Pick. 232.

fullest effect, it only raises a suspicion that the *animus manendi* may have been wanting. It is insisted that Cheever never resided in Indiana; that the domicile of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper she should do so. The right springs from the necessity of its exercise, and endures so long as the necessity continues.<sup>1</sup> The proceeding for a divorce may be instituted where the wife has her domicile. The place of marriage, of the offense, and the domicile of the husband are not necessary to jurisdiction.<sup>2</sup>

The statute of Indiana enacted that "the court, in decreeing a divorce, shall make provisions for the guardianship, custody, and support, and education of the minor children of such marriage." Act 1852, sec. 21. That part of the decree which relates to this subject, has been already sufficiently considered.<sup>3</sup> The case of *Barber v. Barber*<sup>4</sup> has an important bearing upon the case under consideration. There a wife had obtained a divorce *a mensa et thoro*, and an allowance of alimony in the State of New York. The husband afterwards removed to Wisconsin. To enforce the payment of the alimony she sued him in equity in the District Court of the United States for that district. The court was clothed with equity powers. The ground of Federal jurisdiction relied upon was the domicile of the husband and wife in different States. The court decreed for the complainant. This court, on appeal, recognized the validity of the original decree, sustained the jurisdiction, and affirmed the decree of the court below. This is conclusive upon several of the most important points involved in the case before us.<sup>5</sup>

<sup>1</sup> *Harding v. Alden*, 9 Me. 140; *Alden*, 9 Me. 140; *Maguire v. Maguire*, 7 Dana, 181; *Hollister v. Hollister*, 6 Pa. St. 449; *Shafer v. Bushnell*, 25 Wis. 372; *Hall v. Hall*, 25 Wis. 600; *Platt's Appeal*, 80 Pa. St. 501.  
<sup>2</sup> *Cheever v. Wilson*, 9 Wall. 108.  
<sup>3</sup> *Cheever v. Wilson*, 9 Wall. 108.  
<sup>4</sup> *Barber v. Barber*, 21 How. 582.  
<sup>5</sup> *Cheever v. Wilson*, 9 Wall. 108; *S. P., Kinnier v. Kinnier*, 45 N. Y. 535; *Hunt v. Hunt*, 72 N. Y. 217.

<sup>2</sup> *Diston v. Diston*, 3 R. I. 87; *Shaw v. Shaw*, 98 Mass. 158; *Harding v.*

§ 541. It will be seen from the decisions cited on this subject, that the great object in view of the courts of this country and England is the prevention of fraud upon innocent parties and imposition upon foreign courts. It may therefore be declared that the rule is well settled, that the actual *bona fide* residence of either husband or wife within a State will give to that State authority to determine the *status* of such party, and to pass upon any question affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage or of any alleged offense; and that any such court in that State as the Legislature may have authorized to take cognizance of the subject, may lawfully pass upon such questions and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that State or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party,<sup>1</sup> and that a decree of divorce valid and effectual by the laws of the State in which it was obtained is valid and effectual in all other States, and a sentence of divorce obtained *bona fide* and without fraud, pronounced between parties actually domiciled in the country, whether natives or foreigners, by a competent tribunal having jurisdiction over the case, is valid if valid in the State where it is rendered, and is a complete dissolution of the marriage in whatever country it may have been originally celebrated.<sup>2</sup>

<sup>1</sup> Hare v. Hare, 15 Tex. 355; Pawling v. Bird, 13 John. 192; Kerr v. Kerr, 41 N. Y. 272; Cooper v. Cooper, 7 Ohio, 594; Smith v. Smith, 4 Greene, 266; Yates v. Yates, 13 N. J. Eq. 281; Waltz v. Waltz, 18 Ind. 449; Gleason v. Gleason, 4 Wis. 64; Pitt v. Pitt, 4 Macq. 627; Dolphin v. Robbins, 7 H. L. C. 390; Shaw v. Gould, L. R. 3 H. L. C. 55; Shaw v. Atty. Genl., L. R. 2 P. & D. 156; Sinclair v. Sinclair, 1 Const. 294; Tollemache v. Tollemache, 1 S. & T. 557; Wilson v. Wilson, L. R. 2 P. & D. 435; Brothie v. Brocue, 30 L. J. 185; Yelverton v. Yelverton,

1 S. & T. 574; Hull v. Hull, 2 Strobb. Eq. 174; Manley v. Manley, 4 Chand. 97; Hubbell v. Hubbell, 3 Wis. 662; Mansfield v. McIntyre, 1 Ohio, 24; Ditson v. Ditson, 4 R. I. 87; Rebstock v. Rebstock, 2 Pittsb. R. 124; Harrison v. Harrison, 19 Ala. 499; Harding v. Alden, 9 Me. 146; Holman v. Bank, 13 Ala. 369; Maguire v. Maguire, 7 Dana, 181; Thompson v. State, 28 Ala. 12; Burlen v. Shannon, 115 Mass. 438.

<sup>2</sup> Cheever v. Wilson, 9 Wall. 108; Dorsey v. Dorsey, 7 Watts, 350; Kinnier v. Kinnier, 58 Barb. 424; S. C., 46 N. Y. 535; Shaw v. Gould, L. R. 3

This rule must be the correct one or the propositions upon which it is based are unsound and the courts having enunciated them, have established principles that are clearly wrong. Every tribunal, whether sustaining the principle we have stated or the contrary one, have affirmed the following propositions upon which the rule is based: 1st. "Every sovereignty has exclusive control over the personal *status* of all domiciled within its territorial limits; this is unquestioned. 2d. Marriage and the rights and incidents arising therefrom are matters of personal *status*. 3d. The well-settled doctrine that husband and wife may have separate domiciles whenever it is necessary or proper that they should; and, 4th. As a corollary from these rules, the final one that each must seek and can only obtain a divorce from the other in the tribunals and under the laws of their own *bona fide* domicile.

§ 542. The act of Congress of May 26, 1790, declares that the records and judicial proceedings of the courts of any State shall be proved and admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief-justice, or presiding magistrate, as the case may be, that the said attestation is in due form of law. This provision has been construed in various ways. No one but the clerk of the court can certify to the correctness of a record. In a late case it was said, the first error alleged is in the admission of a record of the probate court of the Territory of Colorado, certified to in the name of the clerk by a deputy. It is not claimed that this record as authenticated was admissible under the section of our own statutes applicable thereto (Gen. Stat. p. 700, § 371), but it is claimed that it was under section 905 of the U. S. Revised Statutes. That section, however, authorizes attestation by the clerk, and names no other person. And it seems to be settled that this of itself grants no authority to a deputy-clerk.<sup>1</sup> This last case is directly in point, and in it the court says: "The attestation is directed to be by the clerk, and not by any person

H. L. 55; *Dolphin v. Robbins*, 7 H. L. C. 390; *Pitt v. Pitt*, 4 Macq. 627.

<sup>1</sup> *Stephenson v. Baumster*, 3 Bibb, 369; *Morris v. Patchin*, 24 N. Y. 394; *Lothrop v. Blake*, 3 Pa. St. 495;

*Sampson v. Overton*, 4 Bibb, 409; *Schneitzell v. Young*, 3 H. & McH. 502; *Greenleaf Ev.* § 504; *Whart. Ev.* § 100.

acting as a substitute for the clerk, or possessing like power under the State laws. In making the certificate, which is made evidence under the act of Congress, the clerk derives his authority from the Federal and not from the State laws, and the certificate has vitality and effect, not by reason of the official character of the officer making it under the laws of the State, but in virtue of the act of Congress prescribing it as the mode of proof in this particular case. The certificate of the judge, as to the authority of any person other than the clerk to make the certificate, is of no more force than would be a like certificate as to the effect of the judgment. Again, if a deputy-clerk, or other person, could make the certificate by reason of the power conferred upon him by the State laws, and thus satisfy the act of Congress, such law should be proved as other facts are proved, or as other laws are proved, and not by the certificate of the judge, which is not made evidence of any such fact. The records were not competent evidence, and were improperly admitted."<sup>1</sup>

Where the transcript is certified by the clerk of the court, and the presiding judge certifies that the attestation is in due form, it is a sufficient compliance with the act of Congress,<sup>2</sup> but the mere certificate of a judge that the person who attests the copy of the judgment roll from that State is a clerk and the signature is in his handwriting *is not sufficient, but it must state that the attestation clause is in due form*,<sup>3</sup> which must be annexed to the exemplification of the record.<sup>4</sup> The seal of the court must be annexed to the record with the clerk's certificate, but where a record issues from a court without a seal, the fact that it has no seal must be stated in either the clerk's or judge's certificate.<sup>5</sup> The judge who attests the record must be the judge of the court which rendered the judgment; a certificate of a judgment of another State not made in accordance with the provisions of the

<sup>1</sup> K. P. R. W. Co. v. Cutter, 19 Kas. 83.

<sup>2</sup> Harner v. Spelman, 78 Ill. 206; Blair v. Caldwell, 3 Mo. 355; Grover v. Grover, 30 Mo. 405; Ferguson v. Harwood, 7 Cranch, 408.

<sup>3</sup> Hutchins v. Gerrish, 52 N. H. 205; Milburn v. Hall, 16 Mo. 426;

Tooker v. Thompson, 3 McL. 93; Craig v. Brown, Pet. C. C. 354.

<sup>4</sup> McFarland v. Hamilton, 2 Bay, 555; Norwood v. Cobb, 20 Tex. 588; Thompson v. Mason, 4 Ill. App. 452.

<sup>5</sup> Craig v. Brown, 1 Pet. C. C. 352; Kirkland v. Smith, 2 Mart. (La.) 497; Cox v. Jones, 52 Ga. 438; Strode v. Churchill, 2 Litt. 75.

act of Congress nor with the statute of the State where the record is sought to be used, will not authorize a recovery of judgment thereon. Where the judgment appears to have been rendered in "Cattaraugus county in the fourth judicial department in the State of New York," and a judge certifies and a clerk certifies, it must appear that Cattaraugus county *is* in the fourth judicial department, and that the judge who certifies *is* judge of the court out of which the record comes, and of which the certifying clerk *is* clerk, or the record can not be used,<sup>1</sup> but if there are two or more judges, it must be authenticated by the chief or presiding judge.<sup>2</sup> In regard to the authentication of records of State courts, it is not necessary that it should be precisely as required by acts of Congress. Each State has its own statutory provisions in regard to the authentication of records, and where there is no provision, the common law rule applies. Thus, the record of a judgment rendered in a court of the United States, and certified by the clerk thereof as required by the common law and in a manner sufficient under a State statute, is admissible in evidence notwithstanding it is not authenticated as required by act of Congress.<sup>3</sup> Where a court has ceased to exist and its records have been transferred to another court, then the presiding judge and clerk of the latter must certify.<sup>4</sup> No particular form of words is necessary to show the rendition of a judgment. A transcript which indicates the time, place, parties, matters in dispute, and adjudication thereon, is sufficient.<sup>5</sup> Records of a Bankrupt court in one district authenticated in conformity with the Bankrupt act are admissible in any United States District Court in an action by the assignee of a bankrupt.

It is not necessary that the record of a judgment should be authenticated as provided by the act of Congress passed in pursuance of article 4, section 1, of the Federal Constitution, to render it admissible in the courts of the United States; and the

<sup>1</sup> Boston v. Steel, Mo. ; Phelps v. Tilton, 17 Ind. 423; Buck v. Grimes, 62 Ga. 605

<sup>2</sup> Pratt v. King, 1 Oreg. 49; Settle v. Allison, 8 Ga. 200; Shaw v. Hurd, 3 Bibb, 371; Stewart v. Gray, Hemp. 94; Catlin v. Underhill, 4 McL. 199;

Van Stork v. Griffin, 71 Pa. St. 240; Brown v. Johnson, 42 Ala. 208.

<sup>3</sup> Dean v. Chapin, 23 Mich. 275; Cochran v. State, 46 Ala. 714.

<sup>4</sup> Darrah v. Watson, 36 Iowa, 116; Manning v. Hogan, 26 Mo. 570; Capen v. Emery, 5 Met. 436.

<sup>5</sup> Church v. Crossman, 41 Iowa, 313

District Court of the United States, even out of the State composing the district, is to be regarded as a domestic and not a foreign court, and the records of the court may be proved by the certificate of the clerk, with the seal of the court, without the certificate of the judge.<sup>1</sup> When a record is properly authenticated, immaterial matters, surplusage and the like, will not prevent its admissibility as evidence.

§ 543. It is held by some few courts that in actions brought on judgments of foreign States, that it is necessary to allege that the court in the original action had jurisdiction of the subject matter and of the defendants.<sup>2</sup> But this certainly cannot be the doctrine on principle. The action on a judgment of another State is like any ordinary action; every matter of defense must be pleaded; the question of jurisdiction is like that of infancy, coverture or the statute of limitations, it is personal to the defendant, he must set it up if he wants to obtain the benefit of this plea. It is simply a matter of defense, and the presumption is in favor of the jurisdiction. An averment of jurisdiction is not therefore necessary in the petition or complaint. If the court had no jurisdiction, the defendant must not only allege but prove it.<sup>3</sup> It is an acknowledged and fixed principle of universal obligation, resulting from the comity and respect due one judicial tribunal to another, that a judgment of a court of record of a sister State is in itself *prima facie* evidence of jurisdiction, and it is not necessary for the party pleading such judgment to set out affirmatively in his plea the jurisdiction and facts upon which the power and authority of the court pronouncing judgment depend. Where a judgment appears to be for the foreclosure of a lien, as a mortgage, it must be alleged and proved that it took effect as a personal judgment in the place where it was obtained.<sup>4</sup> Where the judgment is a personal one, the com-

<sup>1</sup> Adams v. Way, 33 Conn. 430; Michener v. Payson, 13 N. B. R. 50; Mason v. Lawrason, 1 Cr. C. C. 190.

<sup>2</sup> Karns v. Kunkle, 2 Minn. 313; Smith v. Mulliken, 2 Minn. 319; Ashley v. Laird, 14 Ind. 222; Martin v. Moore, 1 Wy. Ter. 222.

<sup>3</sup> Reid v. Boyd, 13 Tex. 241; Butcher v. Bank, 2 Kas. 70; Pritchett

v. Clark, 3 Harring. 241; Roe v. Hurlburt, 17 Ill. 572; Phelps v. Duffy, 11 Nev. 80; Low v. Burrows, 12 Cal. 181; Archer v. Romaine, 14 Wis. 375; Bank v. Bank, 7 Gill, 415; Rogers v. Odell, 39 N. H. 452; Spaulding v. Baldwin, 31 Ind. 376.

<sup>4</sup> Porcheler v. Bronson, 50 Tex. 553.

plaint need only allege the name of the court, that it was of competent jurisdiction, the time, amount, &c., without alleging the proceedings.<sup>1</sup>

§ 544. Where there is a finding by the court that a defendant has been duly served with process, such finding cannot be impeached by the evidence of such defendant.\* For if a record of a judgment is *prima facie* evidence, the burden of proof to overthrow this presumption of service is on the defendant, and his uncorroborated testimony should not be allowed to overcome the return of the officer as to service, and the recital in the record of jurisdiction, when it is for his interest to have the record impeached. There has been no adjudication by the Supreme Court of the United States on this point, and we think that the rule laid down by the Supreme Court of Illinois is the correct one. The maxim of *omnia rite esse acta* stands as evidence of the fact, unless the contrary be shown, for the presumptions are in favor of the regularity of the acts of the officer. The rule is, that an officer will not be deemed guilty of an omission which would be a culpable neglect of duty, and for which he would be liable. So that there should be strong corroborative evidence by disinterested parties to overcome this *prima facie* recital in the record of jurisdiction or service. This is the rule adopted by courts in regard to the amount of proof requisite to contradict a certificate of acknowledgment in a conveyance, and there is certainly more reason for applying the rule to a judgment record than to a mere notary's certificate, acknowledging the execution of a conveyance. It may be that a judgment record does not rank as high as a deed, at least some of the courts of last resort seem to make the distinction, and allow one but not the other to be impeached; that is, a defendant may contradict the return of the officer serving him with legal notice of the commencement of an action, but the uncorroborated evidence of a grantor in a conveyance will not be allowed to contradict the certificate of a notary public, who may have no more conception of a valid acknowledgment than a child: and yet it is said that "Law is a science."

<sup>1</sup> *Martin v. Moore*, 1 Wy. Ter. *Russell v. Baptist, &c. Union*, 73 Ill. 222. 337; *Westcott v. Brown*, 13 Ind. 83.

<sup>2</sup> *Davis v. Dresback*, 81 Ill. 393;

§ 545. Where it appears on the face of the record that the court did have jurisdiction, extrinsic evidence to contradict it is not admissible under a plea of *nul tiel* record. The office of pleading is to inform the court and the parties of the facts in issue; the court, that it may declare the law, and the parties, that they may know what to meet by their proof. *Nul tiel record* puts in issue only the facts of the existence of the record, and is met by the production of the record itself valid upon its face, or an exemplification duly authenticated under the act of Congress. A defense requiring evidence to contradict the record must necessarily admit that the record exists as a matter of fact, and seek relief by avoiding its effect. It should, therefore, be formally pleaded, in order that the facts upon which it is predicated may be admitted or put in issue. Under the common-law system of pleading, this would be done by a special plea. The equivalent of such a plea is required under any system. The precise form in which the statement should be made will depend upon the practice of the court in which it is to be used; but it must be made in some form. Defects appearing on the face of the record may be taken advantage of upon its production under a plea of *nul tiel record*, but those which require extrinsic evidence to make them apparent must be formally alleged before they can be proven. This we believe to be in accordance with the practice of all courts in which such defenses have been allowed, and it is certainly the logical deduction from the elementary principles of pleading.<sup>1</sup>

A special plea in bar of a suit on a judgment in another State, to be valid, must deny, by positive averments, every fact which would go to show that the court in another State had jurisdiction of the person, or of the subject-matter.

§ 546. The question whether *nil debet* was a good plea to an action founded on a judgment of another State, was considered by the Supreme Court of the United States at an early day, and much consideration was given to the case, and the decision

<sup>1</sup> *Bimeler v. Dawson*, 5 Ill. 538; *Harrod v. Baretto*, 2 Hall, 302; *Shumway v. Stillman*, 6 Wend. 447; *Starbuck v. Murray*, 5 Wend. 148; *Price v. Hickock*, 39 Vt. 292; *Judkins v. Ins. Co.*, 37 N. H. 482; *Holt v. Allo-* way, 2 Blackf. 103; *Moulin v. Ins. Co.*, 24 N. J. L. 223; *Gilman v. Lewis*, 24 N. J. L. 248; *Aldrich v. Kinney*, 4 Conn. 380; *Hill v. Mendenhall*, 21 Wall. 453.

was that the record of a State court, duly authenticated under the act of Congress, must have in every other court of the United States such faith and credit as it had in the State court from whence it was taken, and that *nul debet* was not a good plea to such an action.<sup>1</sup> Congress, say the court, have declared the effect of the record by declaring what faith and credit shall be given to it; adopting the language of the court in that case, we say that the defendant had full notice of the suit, and it is beyond all doubt that the judgment of the court was conclusive upon the parties in that State. "It must, therefore, be conclusive here also," unless the merits are open to exception and trial between the parties, it is difficult to see how the plea of fraud can be admitted as an answer to the action. The plea of *nul debet* is inadmissible, in an action on a judgment of the court of another State; no plea can be received that would be bad in the State where the original judgment was obtained.<sup>2</sup> But a plea of *nul tiel* record is the only plea allowed, and under it the defendant may show that it was obtained by fraud, or that the action was commenced by attachment without personal service, or he was not served with process within the jurisdiction of the court, or that the court had no jurisdiction over the subject matter. But payment cannot be proved under *nul tiel* record.<sup>3</sup> It is too well settled to be now questioned, that *nul debet* is not a good plea to an action founded on a judgment of another State.<sup>4</sup> If the judgment is inconclusive in the State in which it was rendered, or if it is inquirable into these during a particular period and on certain conditions, it will be open to the same extent everywhere else.<sup>5</sup>

<sup>1</sup> Mills v. Duryee, 7 Cranch, 541; Maxwell v. Stewart, 22 Wall. 77.

<sup>2</sup> Cook v. Thornhill, 13 Tex. 293; Brundell v. Vaux, 2 Dall. 302; Mills v. Duryee, 7 Cranch, 481; Norwood v. Cobb, 20 Tex. 588; Goodrich v. Jenkins, 6 Ohio, 43.

<sup>3</sup> David v. Smith, 5 Ga. 274; Davis v. Headley, 22 N. J. Eq. 115; Rogers v. Gwinn, 21 Iowa, 58; Eaton v. Hasty, 6 Neb. 419; Tunstall v. Robinson, Hemp. 229; Barrett v. Oppenheimer, 12 Heisk. 298.

<sup>4</sup> Mills v. Duryee, 7 Cranch, 541; Maxwell v. Stewart, 22 Wall. 77; Lawrence v. Jarvis, 32 Ill. 504; Davis v. Lane, 2 Ind. 548; Warren v. Couset, 8 Mod. 324.

<sup>5</sup> Baugh v. Baugh, 4 Bibb, 556; Green v. Sarmiento, 1 Pct. C. C. 74; Curtis v. Gibbs, 1 Pen. 399; Rogers v. Coleman, 1 Hardin, 413; Wornwag v. Pauling, 5 H. & J. 500; Spencer v. Sloan, 8 La. Ann. 290; Mills v. Duryee, 7 Cranch, 541; R. R. Co. v. Risley, 50 Ind. 60.

§ 547. A question which may be said to be settled, and yet not, is the one whether the defense of fraud can be successfully maintained in order to impeach a judgment of a sister State. While there may be no room for doubt after two decisions upon this question by the Supreme Court of the United States, where the defense was squarely presented, negating any such ground for impeachment<sup>1</sup> and the same doctrine maintained in various States.<sup>2</sup> But while the constitution of the United States provides that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, *and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.*"<sup>3</sup> In pursuance of this power Congress enacted, May 26, 1790, after providing for the mode of authentication, "the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law and usage in the courts of the State from whence the said records are or shall be taken." The constitution of the United States having conferred upon Congress the power to declare the effect of judicial proceedings, and Congress having declared their effect to be the same as in the State where rendered, the question then must be determined, not according to the decisions of the Supreme Court as above declared, but in accordance with the effect accorded domestic judgments in the States where rendered. If then the plea of fraud is a valid one in any State to a judgment rendered by a court therein, it must under the act of Congress

<sup>1</sup> Christmas v. Russell, 5 Wall. 304; Maxwell v. Stuart, 23 Wall. 77; Allison v. Chapman, 19 F. R. 488.

<sup>2</sup> Benton v. Burgot, 10 S. & R. 240; Hockaday v. Skeggs, 18 La. Ann. 681; Granger v. Clark, 22 Me. 130; Atkinson v. Allen, 12 Vt. 624; Hammond v. Wilder, 25 Vt. 342; Anderson v. Anderson, 8 Ohio, 108; Rankin v. Barnes, 5 Bush, 20; Sheldon v. Kendall, 7 Cush. 217; Homer v. Fish, 1 Pick. 435; O'Shaughnessy v. Baxter, 121 Mass. 515; Sandford v. Sandford, 28 Conn. 6; Embury v. Connor, 8 N. Y.

511; Dobson v. Pearce, 12 N. Y. 156; M. Ra. v. Mattoon, 13 Pick 53; R. R. v. Sparhawk, 1 Allen, 448; Hammond v. Wilder, 23 Vt. 346; Campbell v. Strong, 1 Hemp. 265; Cannon v. Brume, 45 Ala. 262; Hollister v. Abbott, 31 N. H. 448; Rathbone v. Terry, 1 R. I. 78; Topp v. Bank, 2 Swan, 184; Wall v. Wall, 28 Mis. 413; Bicknell v. Field, 8 Paige, 440; Peel v. January, 35 Ark. 331; S. C., 37 Am. R. 27; Johnson v. Dobbins, 12 Phila. 518.

<sup>3</sup> Const. U. S. art. 4, § 1.

and the Federal constitution be a valid plea to a judgment of such State when made the basis of a cause of action in another jurisdiction. That is, every defense available against such judgment in the State where the original action was brought is a valid defense in the court of any sister State. And it is held in a number of cases that the defense of fraud in obtaining a judgment may be made by plea, in a court of law, to an action upon such judgment from another State.<sup>1</sup> The doctrine in New York is that there may be such fraud upon a tribunal and upon the opposite party in judicial proceedings as will vitiate a judgment obtained thereby.<sup>2</sup> But the fraud in such case is made up of the same constituents as is fraud in any other case, and the same state of facts must appear which is required in other cases. There must be fraudulent allegations and representations designed and intended to mislead, with knowledge of falsity, and resulting in damaging deception.

In Iowa, the doctrine is declared to be that fraud in the obtaining may be pleaded to an action upon a domestic as well as a foreign judgment.<sup>3</sup> That is, that although a defendant was personally served with summons, yet if he was fraudulently induced to come within the jurisdiction of the court for that purpose he may, notwithstanding the judgment, plead the fraud and thus avoid it. This is the rule also in Kentucky.<sup>4</sup> The doctrine in England is well settled that a party will be relieved from the consequences of a jurisdiction obtained by fraud or violence.<sup>5</sup>

<sup>1</sup> *Roper v. Gwinn*, 21 Iowa, 59; *Whetstone v. Whetstone*, 31 Iowa, 276; *Coffee v. Neely*, 2 Heisk. 304; *Eaton v. Hasty*, 6 Neb. 419; *Sharman v. Morton*, 31 Ga. 34; *Jarvis v. Sewall*, 40 Barb. 449; *Phillips v. Godfrey*, 7 Bosw. 150; *Rogers v. Rogers*, 15 B. Mon. 364; *Hindman v. Mackall*, 3 Iowa, 170; *Lawrence v. Jarvis*, 32 Ill. 304; *Ward v. Quinliom*, 57 Mo. 425; *Conway v. Ellison*, 14 Ark. 360; *Norwood v. Cobb*, 20 Tex. 588; *Wood v. Watkinson*, 17 Conn. 500; *Welsh v. Sykes*, 8 Ill. 197; *Edgell v. Sigerson*, 20 Mo. 494; *Erwin v. Toole*, 31 Iowa, 513; *Dunlap v. Cody*, 31 Iowa, 260;

*Ellis v. Kelly*, 8 Bush, 621; *Stuart v. Stuart*, 3 McArthur, 415.

<sup>2</sup> *Michigan v. Bank*, 33 N. Y. 9; *Hunt v. Hunt*, 72 N. H. 227.

<sup>3</sup> *Whetstone v. Whetstone*, 31 Iowa, 276; *Cowan v. Toole*, 31 Iowa, 513; *Dunlap v. Cody*, 31 Iowa, 260.

<sup>4</sup> *Ellis v. Kelly*, 8 Bush, 621.

<sup>5</sup> *Wells v. Gurney*, 8 B. & C. 769; *Lutton v. Benin*, 11 Mod. 50; *Wingate v. Insley*, 12 Pick. 270; *Barlow v. Hall*, 2 Anst. 461; *Loveridge v. Plastow*, 2 H. Black. 29; *Lyford v. Terrell*, 1 Anst. 85; *Wilson*, in re, 1 Ark. 152; *Lloyd v. Munsell*, 2 P. Wms. 74; *Michigan v. Bank*, 33 N. Y. 22; *Dobson v. Pearce*, 12 N. Y. 165.

The reasoning of the courts allowing this defense is unanswerable. If the defendant can be relieved from the effects of a judgment in the State where it is rendered, why should he not be entitled to the same relief in the State of his residence where the judgment is sought to be enforced? To deny him the same relief in his own State would be giving a foreign judgment a much more conclusive effect in the sister State than in the State where it was originally rendered. Then citizens should not be driven to foreign States to protect their rights. If they have a legal right, or are being subjected to a wrong, they may look to the tribunal having jurisdiction over them and the subject matter, if the opposite party has placed himself within this jurisdiction. To exclude the defense of fraud would, in many cases, be oppression or an absolute denial of justice, the inconvenience and expense of going to a distant State, of there employing counsel and litigating the matter would be so great, and the principal reason for the disintiction is that a foreign judgment cannot be reached by citizens of one State, for the purpose of reversing it, without going into the foreign jurisdiction for the purpose. Can it be said that the constitution and acts of Congress require that a judgment which in the State where rendered can be impeached or avoided for fraud should be so conclusive when made the basis of an action in a foreign jurisdiction that it cannot be impeached or avoided upon the same ground? The doctrine need only to be stated to be refuted.

§ 548. In those States where the defense of fraud is not permitted, the courts have a method of arriving at the same result, but in an entirely different mode; as, for instance in a late case, where a judgment from the District of Columbia was made the basis of an action in one of the courts of the State of Connecticut; the defendants asked for an injunction against the prosecution of the action and any enforcement of the judgment. The court says: The judgment was rendered by a court having jurisdiction of person and cause; it stands here upon an equal footing with a judgment rendered in our court, with this distinction as to manner of enforcement: execution does not go from it against person or property; a suit must be instituted and a new judgment obtained thereon in our own courts; but whenever such suit has been instituted, or an execution has been sent out upon

a domestic judgment, it is within the province of a court of equity to restrain proceedings in either case alike, if it is certified that it is against equity and good conscience that they should be enforced; and this not in denial of the authority of the court rendering the judgment, or of the legality of its action; the injunction is not directed against it, but is strictly *in personam*, to restrain persons from making courts of law instruments of wrong. In all cases where a party has by accident, mistake, or fraud obtained an unfair advantage in a proceeding at law which must necessarily make that court an instrument of injustice, a court of equity will interfere to restrain him from using the advantage thus improperly gained. And the court will enjoin against the use of such a judgment where rendered by the courts of another State as well as where rendered by our own courts.<sup>1</sup> There can be no doubt that a court of equity has power to look into the judgments of other courts, and if it appears they are infected with fraud, to give relief against them.<sup>2</sup> The power of the court to relieve against fraudulent judgments is not limited to judgments recovered in the courts of the same State, but may be exerted against judgments recovered in the courts of other states. Whenever they are sought to be made the foundation of an action or a defense<sup>3</sup> in those states where the code system obtains and the functions of the courts of common law and chancery are united in the same court, and the distinctions between actions at law and suits in equity and the forms of all such actions and suits are abolished, and *the defendant may set forth by answer as many defenses as he may have, whether they be such as have been heretofore denominated, legal or equitable, or both*, and where affirmative relief is authorized to be given to a defendant in an action by the judgment, the opinion of Judge Clifford, in *Christmas v. Russel*, that resort must be had to a court of chancery to obtain relief against a

<sup>1</sup> *Stanton v. Embury*, 46 Conn. 595; *Engel v. Schearman*, 40 Ga. 206.

<sup>2</sup> *Glover v. Hedges*, 1 N. J. Eq. 119; *Boulton v. Scotts*, 3 N. J. Eq. 231; *Van Meter v. Jones*, 3 N. J. Eq. 523; *Bowers v. Butler*, 4 N. J. Eq. 465; *Ins. Co. v. Hodgson*, 7 Cranch, 336; *Simpson v. Hart*, 1 John. Ch. 98;

*Barnesley v. Powell*, 1 Ves. 289; *Brown v. Brown*, 1 Vern. 157; *Mussell v. Morgan*, 3 Bro. C. C. 74; *Richmond v. Taylor*, 1 P. Wms. 734; *Lloyd v. Mansell*, 2 P. Wms. 73.

<sup>3</sup> *Davis v. Headley*, 22 N. J. Eq. 123; *Pearce v. Olney*, 20 Conn. 544; *Dobson v. Pearce*, 12 N. Y. 165.

fraudulent judgment can not apply, for there is no such court and no such action—the civil action includes suits on judgments of other States, and from the provisions of the codes the intention of the State Legislatures is that all controversies respecting the matter of litigation shall be determined in one action; whether fraud or imposition in the recovery of a judgment could, prior to the adoption of such codes, have been alleged against it collaterally at law or not, it may now be set up as an equitable defense to defeat a recovery upon it. Under the head of equitable defenses are included all matters which under the former system would have authorized an application to the court of chancery for relief against legal liability, but which at law could not have been pleaded in bar. Fraud, which would have been a good cause for relief against a judgment in a court of chancery is under the code system a proper matter of defense; an equitable defense to a civil action under the old practice, is now available as a legal defense; and in an action on a foreign judgment, the question is ought the plaintiff to recover? and anything which shows that he ought not, is available to the defendant, whether it was formerly of equitable or legal cognizance. If this then is the effect of the code system and the abolition of legal and equitable actions, it must under the act of Congress, giving a judgment in foreign jurisdiction, the same effect and usage as it has by the laws of the state where rendered. The result must be that in every State, where fraud or any other defense may be made available, as a defense to an action on a judgment, it is a proper plea in any other State in which the plaintiff seeks to avail himself of it against the defendant. The plaintiff seeking and placing himself in such foreign jurisdiction, is bound by the procedure there in force.

§ 549. The general rule is that if a judgment is conclusive between the parties in the State where it was rendered, it is equally so in every court in the United States, and consequently the plea of fraud in procuring the judgment is not a legal defense to an action on the judgment in a sister State.

§ 550. Domestic judgments, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction. It could only be

done directly by writ of error, petition for new trial, or bill in chancery. Third persons only could set up the defense of fraud or collusion, and not the parties to the record, whose only relief was in equity, except in the case of a judgment obtained on a *cognovit*, or a warrant of attorney.<sup>1</sup> Common law rules placed foreign judgments upon a different footing, and those rules remain, as a general remark, unchanged to the present time. Under these rules, a foreign judgment was *prima facie* evidence of the debt, and it was open to examination, not only to show that the court in which it was rendered had no jurisdiction of the subject-matter, but also to show that the judgment was fraudulently obtained.

§ 551. Recent decisions in England have changed this rule, and now a foreign judgment is so far conclusive upon a defendant that he is prevented from alleging that the premises upon which it is founded were never made or were obtained by fraud of the plaintiff.<sup>2</sup> Cases may be found in which it is held that the judgment of a State court, when introduced as evidence in the tribunals of another State, are to be regarded in all respects as domestic judgments. On the other hand, another class of cases might be cited in which it is held that such judgments in the courts of another State are foreign judgments, and that as such the judgment is open to every inquiry to which other foreign judgments may be subjected under the rules of the common law. Neither class of these decisions is quite correct. They certainly are not foreign judgments under the constitution and laws of Congress in any proper sense, because they "shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the State from whence" they were taken; nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the State where they were rendered.<sup>3</sup> Such judgments are entitled to no priority of lien, nor can execution be issued on them except in the State where rendered,

<sup>1</sup> 2 Saunders on Pleading and Evidence, part 1, p. 63.

<sup>2</sup> Bank v. Nias, 4 E. L. & Eq. 252.

<sup>3</sup> McElmoyle v. Cohen, 13 Pet. 812; Wood v. Watkinson, 17 Conn. 500;

Dimmick v. Brooks, 21 Vt. 569; Darcy v. Ketchum, 11 How. 165; Seevers v. Clement, 28 Md. 426; Folger v. Ins. Co., 99 Mass. 267; Claffin v. McDermott, 12 F. R. 375.

until after suit brought upon them, or can they be the foundation of a judgment *in personam* where the original action was *in rem* and there was no personal appearance of the defendant,<sup>1</sup> nor can they be sustained in any other State in the absence of jurisdiction; but in all other respects they have the same faith and credit as domestic judgments.<sup>2</sup> Subject to these qualifications, the judgment of a State court is conclusive in the courts of all the other States wherever the same matter is brought in controversy. The established rule is, that so long as the judgment remains in force it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process, mesne or final, as the case may be, to execute the judgment.<sup>3</sup>

§ 552. Domestic judgments, even if fraudulently obtained, must, nevertheless, be considered as conclusive until reversed or set aside, and the plea of fraud is not available as an answer to an action on the judgment, and a party to a judgment cannot be permitted in equity, any more than at law, collaterally to impeach it on the ground of fraud or mistake. The whole current of decisions upon the subject seems to recognize the principle that when a cause of action has been instituted in a proper forum, where all matters of defense were open to the party sued, the judgment is conclusive until reversed by a superior court having jurisdiction of the cause, or until the same is set aside by a direct proceeding in chancery. Strangers may show that they were collusive or fraudulent; but they bind parties and privies. Where jurisdiction is shown over the person, no error, mistake or irregularity in the proceedings can be shown for the purpose of impeaching the judgment. The conclusive effect of the judgment is the same in any sister State as in the State where rendered. Even though harsh and erroneous, the judgment will be regarded as valid and conclusive by the courts of another State

<sup>1</sup> Bissell v. Briggs, 9 Mass. 468; Arndt v. Arndt, 15 Ohio, 33; McCicker v. Beedy, 31 Me. 316.

<sup>2</sup> Barney v. White, 46 Mo. 137; Zimmerman v. Helzer, 32 Md. 274; Chew v. Brumagin, 21 N. J. Eq. 520; Zepp v. Hager, 70 Ill. 224; Bimeler

v. Dawson, 5 Ill. 536; Bissell v. Briggs, 9 Mass. 468; D'Arcy v. Ketchum, 11 How. 165; Webster v. Reid, 11 How. 437.

<sup>3</sup> Voorhees v. Bank, 10 Pet. 449; Huff v. Hutchinson, 14 How. 588; Benton v. Burgot, 10 S. & R. 240.

until reversed in the State where it was rendered.<sup>1</sup> So, if a party suffers judgment to pass against him by a wrong name, he is estopped in an action on such judgment to avail himself of the misnomer.<sup>2</sup> But this rule does not apply to a suit dismissed for alleged want of prosecution and never tried on the merits, because, under such circumstances, the cause of action remains unlitigated, and there is, in fact, no judgment.<sup>3</sup> The rule is undeniable, that the judgment or decree of a court possessing competent jurisdiction is final, not only as to subject thereby determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided.<sup>4</sup> Where a court of general jurisdiction in another sovereignty has passed upon the question of its own jurisdiction, when expressly raised by plea, and necessarily considered in giving judgment, the parties to such suit are bound in a home court, under the principle of *res adjudicata*. In such a suit against an insurance company, in a home court, on a judgment from a court of another sovereignty, though the court may look behind the judgment of the court *a quo* into the question of the jurisdiction of that court over the subject matter or parties, and into the validity of the process by which suit there was commenced, yet this power does not, as of course, relieve parties to the suit from the operation of the principle of *res adjudicata*.<sup>5</sup>

§ 553. Assuming that the question of jurisdiction has been satisfactorily established, we are to ascertain the effect of such

<sup>1</sup> Merchants' Ins. Co. v. Dewolf, 33 Pa. St. 45; Scott v. Pilkington, 2 B. & S. 11; Guthrie v. Lowrie, 84 Pa. St. 533; Harvey v. Drew, 83 Ill. 606; Olds v. Glaze, 7 Iowa, 8; Struble v. Malone, 3 Iowa, 586; Crawford v. Simonton, 7 Port. 110; Grover v. Grover, 30 Mo. 400; Brinkley v. Brinkley, 50 N. Y. 184; Rogers v. Rogers, 15 B. Mon. 364; Biesenthal v. Williams, 1 Duvall, 329; Weyr v. Zane, 3 Ohio, 306; Riley v. Murray, 8 Ind. 354; McLendon v. Dodge, 32 Ala. 491; Hart v. Cummings, 1 Iowa, 564; Barringer v. Boyd, 27 Miss. 473; Conway v. Ellison, 14 Ark. 360; Buford v. Kirkpatrick, 13 Ark. 83; Gunn v.

Howell, 35 Ala. 144; Hassell v. Hamilton, 33 Ala. 280; Taylor v. Kilgore, 33 Ala. 214; Milne v. Van Buskirk, 9 Iowa, 558; Indiana v. Helmer, 2<sup>1</sup> Iowa, 370; Rocco v. Hackett, 2 Bosw. 579.

<sup>2</sup> Martin v. Baron, 37 Mo. 301; Guinard v. Heysinger, 15 Ill. 288.

<sup>3</sup> Rankin v. Barnes, 3 Bush, 20; Hughes v. Blake, 1 Mason, 515; Estill v. Taul, 2 Yerg. 467; R. R. v. Lewis, 8 Pick. 113.

<sup>4</sup> Dobson v. Pearce, 12 N. Y. 156; Ante, § 459.

<sup>5</sup> Moch v. Ins. Co., 10 Fed. Rep. 696.

judgment. The effect of such judgment is to be determined by the laws of the State where it is rendered.<sup>1</sup> The presumption will be, that it is valid and binding in the State where rendered, and until the contrary is shown, full faith and credit will be given to it,<sup>2</sup> and that it was rendered in conformity to the laws of such state;<sup>3</sup> defects in matters of form will not affect it,<sup>4</sup> and when offered in evidence in another State, it is the highest evidence that it was warranted by the laws of the State where rendered, and other evidence is inadmissible to disprove the fact.<sup>5</sup> It cannot be impeached for any irregularity, but only for want of jurisdiction of the person,<sup>6</sup> and is as much a bar as a domestic judgment.<sup>7</sup> But the constitutional provision, that full faith and credit shall be given in the courts of one State to judgments of another, does not affect the question of enforcing a judgment which is uncertain or ambiguous in terms. If a judgment is not certain, or capable of being made so by intendment, it is not to be enforced, even though it was rendered in another State.<sup>8</sup> Thus, a foreign judgment rendered without a statement

<sup>1</sup> *Brumagin v. Chew*, 19 N. J. Eq. 130; *Reed v. Girty*, 6 Bosw. 567; *Dupasseur v. Rocheau*, 21 Wall. 130; *Gilchrist v. Company*, 21 W. Va. 115; S. C., 45 Am. R. 555.

<sup>2</sup> *French v. Pease*, 10 Kans. 51; *Nunn v. Sturges*, 22 Ark. 389; *Gilchrist v. Company*, 21 W. Va. 115; S. C., 45 Am. R. 555; *R. R. Co. v. Meicer*, 11 Phila. 226; *Cook v. Thornhill*, 13 Tex. 203; *Peel v. January*, 35 Ark. 331; S. C., 37 Am. R. 27.

<sup>3</sup> *Graydon v. Justus*, 24 La. Ann. 222; *McLendon v. Dodge*, 32 Ala. 491; *Gilchrist v. Company*, 21 W. Va. 115; S. C., 45 Am. R. 555.

<sup>4</sup> *Robinson, in re*, 6 Blatchf. 253.

<sup>5</sup> *Davidson v. Sharp*, 6 Ired. 14; *Cannon v. Brame*, 45 Ala. 262; *Dart v. Goss*, 24 Mich. 266.

<sup>7</sup> *Conway v. Ellison*, 14 Ark. 360; *Jardine v. Reichart*, 29 N. J. L. 165; *Sydam v. Cannon*, 1 Houst. 431; *Anderson v. Fly*, 6 Ind. 76; *Eaton v. Hasty*, 6 Neb. 419; *Riley v. Murray*,

8 Ind. 554; *Norwood v. Cobb*, 20 Tex. 588; *Martin v. Barron*, 37 Mo. 301; *Grover v. Grover*, 30 Mo. 400; *Phillips v. Godfrey*, 7 Bosw. 150; *Milne v. Van Buskirk*, 9 Iowa, 538; *State v. Helmers*, 21 Iowa, 370; *McFarland v. White*, 13 La. Ann. 394; *Crawford v. White*, 17 Iowa, 560; *Sheehy v. Professional, &c. Co.*, 2 C. B. N. S. 211; *Scott v. Pilkington*, 2 B. & S. 11; *Lazier v. Westcott*, 26 N. Y. 146; *Vanquelin v. Bouard*, 15 C. B. N. S. 341; *Brissac v. Rathbone*, 6 H. & N. 301; *Imrie v. Castrique*, 8 C. B. N. S. 405; *Laurence v. Jarvis*, 32 Ill. 304.

<sup>7</sup> *Cincinnati, &c. Co. v. Wynne*, 14 Ind. 385; *Rocco v. Hackett*, 2 Bosw. 579; *Robert v. Hodges*, 16 N. J. Eq. 299; *Moulin v. Ins. Co.*, 24 N. J. L. 222; *Black v. Black*, 4 Blackf. 174; *West, &c. Co. v. Thornton*, 12 La. Ann. 736.

<sup>8</sup> *Fritz v. Fisher*, 5 Pa. L. J. R. 350.

of the cause of action, in some form recognized by law, is of no value, and will not be recognized beyond the jurisdiction of the court which rendered it.<sup>1</sup> But courts will not inquire into the evidence of certain facts shown to exist, but on which no issue is made by the pleadings,<sup>2</sup> and if the judgment is invalid in the State where it is sought to be enforced, no judgment will be rendered thereon, unless its validity is shown by the laws of the State where rendered.<sup>3</sup> But the Supreme Court of the United States say, that nothing more need appear by the record, than that the court had jurisdiction of the subject-matter of the action and of the parties, and that a judgment was in fact rendered. All else is matter of form regulated by the practice of the court, in which the original action was prosecuted.<sup>4</sup> It is only when the jurisdiction of the court in another State is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The court must have had jurisdiction not only of the *cause*, but of the *parties*, and in that case the judgment is final and conclusive.<sup>5</sup> Where the record of a foreign judgment shows neither service of process, notice to, nor appearance by, the defendant, it will be treated as a nullity in the State where suit is brought; but if the record shows a service, notice, or appearance, although not amounting in either case to personal notice or appearance, then jurisdiction is to be presumed until such presumption is rebutted.<sup>6</sup> But the decisions of the tribunals of a State as to the true construction of the laws of their own sovereignty, are as binding on the courts of other States as they are on the Federal courts.<sup>7</sup>

<sup>1</sup> Young v. Rosenbaum, 39 Cal. 646.

<sup>2</sup> Cone v. Hooper, 18 Minn. 533.

<sup>3</sup> Crafts v. Crafts, 31 Iowa, 77.

<sup>4</sup> Maxwell v. Stuart, 22 Wall 77; Tenney v. Townsend, 9 Blackf. 274.

<sup>5</sup> R. R. Co. v. Mercer, 11 Phila. 226; Bowler v. Huston, 30 Gratt. 296; Peel v. January, 35 Ark. 331; S. C., 37 Am. R. 27; Wixom v. Stephens, 17 Mich. 518; Bissell v. Briggs, 9 Mass. 462.

<sup>6</sup> Warren v. McCarthy, 25 Ill. 95; Sim v. Frank, 25 Ill. 125; Bimeler v.

Dawson, 5 Ill. 541; Rangely v. Webster, 11 N. H. 209; Commonwealth v. Blood, 97 Mass. 338; Hassell v. Hamilton, 33 Ala. 236; Gunn v. Howell, 27 Ala. 663; Latterett v. Cook, 1 Iowa, 1; Wilson v. Jackson, 10 Mo. 329; Nunn v. Sturges, 22 Ark. 389; McLendon v. Dodge, 32 Ala. 491; Scott v. Coleman, 5 Litt. 349; Lincoln v. Tower, 2 McL. 473; Tenney v. Townsend, 9 Blatch. 274; Shumway v. Stillman, 4 Cow. 292; Bissell v. Briggs, 9 Mass. 462.

<sup>7</sup> Hunt v. Hunt, 72 N. Y. 217; Bai-

Thus, a court of a sister State having jurisdiction over the subject-matter, as garnishment, where the garnishee appears and pleads in the suit, has authority to determine, whether a non resident under the laws of that State can be subjected to the process of garnishment, and its judgment thereon is therefore conclusive,<sup>1</sup> or a judgment confessed upon a warrant of attorney, under a State statute.<sup>2</sup>

§ 554. Each State must give the same effect, within its limits, to the judicial decrees of every other State, which such decrees have in the State where they are rendered. A judgment, final and conclusive in the State in which it was rendered, is final and conclusive in another State, and a judgment without effect in the State in which it was rendered, is without effect in another. Hence the courts of the State in which a judgment of a court of another State is sought to be enforced, have a right to inquire how far the judgment presented may be conclusive in the State in which it was rendered.<sup>3</sup> So the courts will take judicial notice of the laws of the State where the judgment is rendered. Thus it was said when the judgment impleaded is the judgment of the sister State, the court will notice *ex officio* the law of the State in which it was rendered. The reason given for this is, that in such a case the court acts under the Constitution and laws of the United States, which require that the judgment shall have in every State the same faith and credit which it has in the State where it was originally rendered. In such a case, it was said, the decision of the State court is re-examinable in the Supreme Court of the United States, which will, without averment or proof, take cognizance of the law of the State in which the record originates. It would be a very imperfect and discordant administration for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it fol-

ley v. Maguire, 22 Wall. 215; Galpin v. Page, 18 Wall. 350; Walker v. Harbor Comm'rs, 17 Wall. 648; Secomb v. R. R. Co., 23 Wall. 108; Gilchrist v. Company, 21 W. Va. 115; S. C., 45 Am. R. 555; Gunn v. Howell, 85 Ala. 144; Coleman v. Waters, 13 W.

Va. 278.

<sup>1</sup> Gunn v. Howell, 85 Ala. 144.

<sup>2</sup> Coleman v. Waters, 13 W. Va. 278.

<sup>3</sup> McLaren v. Kehler, 23 La. Ann. 80; Green v. Van Buskirk, 38 How. P. 52.

lows that in questions of this sort we should take notice of the local laws of a sister State in the same manner the Supreme Court of the United States would do on a writ of error to our judgment.<sup>1</sup> Thus, where by statute judgments might be confessed in vacation before the clerk, a judgment so confessed will be as conclusive as one confessed in open court.<sup>2</sup> So where a judgment was entered in New Jersey *pro confesso*, by virtue of a warrant of attorney, signed by the defendant, empowering any attorney in the United States to confess judgment, the whole proceeding being consistent with the laws of the State, it was held, that such judgment was entitled to "full faith and credit" within the meaning of the Constitution of the United States, although it did not appear that any of the parties were residents of that State, or had ever been there.<sup>3</sup> A judgment recovered in a sister State is a bar to the further prosecution of an action pending at the time between the same parties on the same cause of action in another State.<sup>4</sup> And it makes no difference that the judgment of the sister State has been appealed from, and the appeal is still pending, where, by the laws of that State, such appeal operates only as a proceeding in error, and does not supersede the judgment.<sup>5</sup> In such a case, while the action may be maintained notwithstanding the pendency of appellate proceedings in the State where the judgment was rendered, the court in the sister State may order that no execution shall be issued on a judgment obtained in such action, provided the defendant give bond and security to satisfy the judgment and pay all damages, &c., provided the writ of error should be determined adversely to the defendant. If the appeal does not set aside the judgment,

<sup>1</sup> Baxley v. Linah, 16 Pa. St. 241; Rae v. Hulbert, 17 Ill. 572; Butcher v. Bank, 2 Kan. 70; State v. Hinchman, 27 Pa. St. 479; Paine v. Ins. Co., 12 R. I. 440; Wilson v. Jackson, 10 Mo. 330.

<sup>2</sup> Harness v. Green, 19 Mo. 323; Randolph v. Keller, 21 Mo. 557; Sipes v. Whitney, 30 Ohio St. 69.

<sup>3</sup> Randolph v. Keller, 21 Mo. 557.

<sup>4</sup> Bank v. Wheeler, 28 Conn. 433; Bank v. Brown, 50 Mo. 214; Paine v. Ins. Co., 12 R. I. 440; U. S. v.

Dewey, 6 Biss. 501; Bank v. Eldred, 6 Biss. 370; Jones v. Jamison, 15 La. Ann. 35; Child v. Powder Works, 45 N. H. 547; Candee v. Clark, 2 Mich. 285.

<sup>5</sup> Bank v. Wheeler, 28 Conn. 433; Sage v. Harpending, 49 Barb. 166; Harris v. Hammond, 18 How. P. 123; Rathbone v. Morris, 9 Abb. P. 213; Scott v. Pilkington, 2 B. & S. 11; Ins. Co. v. Ray, 75 Va. 821; Clark v. Child, 136 Mass. 344.

the plea is no answer to the action.<sup>1</sup> If the judgment would be a good bar to the maintenance of an action in the State where rendered, it is entitled to have the same effect in any other State where it is either used by the plaintiff as a cause of action, or the defendant in bar of an action<sup>2</sup> (if the judgment is based upon jurisdiction). So where it appears at a trial that in a former suit between the same parties in a sister State the causes of action specially declared on, and all growing out of the same subject matter, could have been proved in the former suit, and that the same proof offered in the subsequent suit, was in the former suit properly introduced and considered on the merits, and a judgment rendered for the defendant, such judgment is a bar to the second or subsequent suit.<sup>3</sup> In an action upon a judgment recovered, a defendant cannot set up payment prior to the recovery of such judgment, or a counter-claim which was set up and determined against him in the former suit.<sup>4</sup> But such judgments rank only as simple contract debts in marshaling the assets of an insolvent estate.<sup>5</sup>

§ 555. As to how far a defendant may go into the original merits of the cause, it is indeed very difficult to perceive what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew, on a suit upon the foreign judgment.<sup>6</sup> Some of the witnesses may have since died, some of the vouchers may be lost or destroyed. The merits of the case, as formerly before the court, upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence that may now appear otherwise. Suppose a case, purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation, is the defendant to be at liberty to re-try

<sup>1</sup> *Suydam v. Hoyt*, 25 N. J. L. 230; *Ins. Co. v. De Wolf*, 33 Pa. St. 45; *Ins. Co. v. Ray*, 75 Va. 821.

<sup>2</sup> *Mills v. Duryee*, 7 Cr. 481; *McElmoyle v. Cohen*, 13 Pet. 212; *Jacquette v. Hugunon*, 2 McLean, 129.

<sup>3</sup> *Baker v. Rand*, 13 Barb 152.

<sup>4</sup> *Dudley v. Stiles*, 33 Wis. 371; *Barras v. Bidwill*, 3 Woods C. C. 5;

*Meredith v. Mining Ass.*, 56 Cal. 178, where it was held that a court of general jurisdiction would be presumed to have passed upon the matters involved in a counter-claim.

<sup>5</sup> *Cameron v. Wurtz*, 4 McCord 278; *Brengle v. McClellan*, 7 G. & J 434; *Harness v. Green*, 20 Mo. 316

<sup>6</sup> *Story Conf. Laws*, § 607.

the whole merits, and to make out, if he can, a new case, upon new evidence?<sup>1</sup> Or, is the court to review the former decision, like a court of appeals, upon the old evidence? In a case of covenant, or of debt, or of a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence, and principles of justice, is the validity of the original judgment to be tried? Is the court to open the judgment, and to proceed *ex aequo et bono*? Or, is it to administer strict law, and stand to the doctrine of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed, the rule that the judgment is to be *prima facie* for the plaintiff, would be a mere delusion if the defendant might still question it by opening all or any of the original merits on his side; for, under such circumstances, it would be equivalent to granting a new trial. It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment by showing that the court had no jurisdiction; or, that he never had notice of the suit;<sup>2</sup> or, that it was procured by fraud; or, that upon its face it is founded in mistake; or, that it is irregular and bad by the local law, *Fori rei judicatae*. To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to re-try the merits of the original cause at large, and to put the defendant upon proving those merits.”<sup>3</sup>

§ 556. To make a foreign judgment (the same rules apply generally to judgments of other States) conclusive, it must appear that it was a final and conclusive judgment.<sup>4</sup> A judgment of a State court, the record of which shows that the defendant had no personal service, and did not appear and submit to the jurisdiction of the court, is not entitled, under the constitution and

<sup>1</sup> *Alivon v. Furneval*, 1 C. M. & R. 277.

<sup>2</sup> *Ferguson v. Mahon*, 11 A. & E. 179.

<sup>3</sup> *Arnott v. Redfern*, 2 C. & P. 88; *Novelli v. Rossi*, 2 B. & A. 757; *Douglass v. Forrest*, 4 Bing. 686; *Obicini v. Bligh*, 8 Bing. 335; *Martin*

*v. Nichols*, 3 Sim. 458; *Buttrick v. Allen*, 8 Mass. 273; 2 Story Conf. Laws, § 607.

<sup>4</sup> *Frayer v. Worms*, 10 C. B. N. S. 149; *Plummer v. Woodburne*, 4 B. & C. 625; *Douglass v. Forrest*, 4 Bing. 686.

laws of the United States, to full faith and credit in every court within the United States. In a suit against a partnership, if one partner is not within the jurisdiction of the court, and is not served with process, and does not voluntarily appear and answer to the suit by himself or his attorney, the judgment against the partnership cannot be enforced against him out of the local jurisdiction, even though by the *lex loci* a service on the partner resident within the jurisdiction is sufficient to authorize a judgment against all the partners.<sup>1</sup>

§ 557. On a judgment recovered against two defendants, only one of whom was summoned, there can be no recovery in another State against the defendant who was summoned; the judgment, being a nullity as to the party not summoned, is a nullity as to both. A judgment, being an entire thing, cannot be separated into parts. The common law rule is, that a judgment is an entire thing and it could not, therefore, be affirmed as to one or more defendants, and reversed as to the others.<sup>2</sup> If then a judgment could not at common law be affirmed in part and reversed in part, because of its entirety, for the same reason if a suit is brought in this State on a foreign judgment, which is admitted to be void as to some of the defendants, such a judgment must be held to be void as to all. The reason of the law is that the judgment is an entire thing, and cannot be separated into parts. If execution is issued on such a judgment, it must be issued against all the defendants. The question was fully considered in Massachusetts,<sup>3</sup> where a suit was brought on a judgment recovered in Georgia against two defendants, and it appeared from the record that one of the defendants had never been summoned, and had never appeared in person, or by attorney, to the suit brought

<sup>1</sup> Hall v. Lanning, 91 U. S. 160; D'Arcy v. Ketchum, 11 How. 165; Smith v. Smith, 17 Ill. 482; Candee v. Clark, 2 Mich. 255; Steel v. Smith, 7 W. & S. 451; Reed v. Girty, 6 Bosw. 567; Suydam v. Barber, 18 N. Y. 468; Knapp v. Abell, 10 Allen, 485; Hale v. Williams, 6 Pick. 232; Rogers v. Burns, 27 Pa. St. 525; Rangely v. Webster, 11 N. H. 299; Jones v. Gerock, 6 Jones Eq. 190; Oakley

v. Aspinwall, 4 N. Y. 513; Dart v. Goss, 24 Mich. 266; Board, &c. v. Columbia College, 17 Wall. 521; Phelps v. Brewer, 9 Cush. 390; Mackay v. Gordon, 34 N. J. L. 286; Menlove v. Oakes, 2 McMull. 162.

<sup>2</sup> Cutting v. Williams, 1 Salk. 24; Parker Harris, Ld. Raymd. 825; Lloyd v. Pearse, Cro. Jac. 425.

<sup>3</sup> Hall v. Williams, 6 Pick. 232.

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against him in Georgia. And it was held—Parker, C. J., delivering the opinion of the court—that the judgment being entered if it was a nullity with respect to one, it was a nullity also as to the other defendant. In the still later case,<sup>1</sup> the question was again argued before the court, and the decision in 6 Pick. was approved, Gray, C. J., saying, that if the “court had no jurisdiction of one defendant, its judgment, being entire and unqualified, is, in the absence of any evidence of the law of Maine on the subject, void against both.” These decisions have been followed by the courts of other States.<sup>2</sup> Courts have permitted judgments, on motion, some of them in the exercise of an equitable jurisdiction, to be set aside as to one defendant and to stand as to others. And in some States it has been decided that a judgment may be valid as to one defendant and void as to others.<sup>3</sup> “The weight of authority is, we think, decidedly the other way, and in accord with the law as laid down in *Hall v. Williams*, *supra*. Looking at the question from an equitable standpoint purely, there is some force in the appellants’ contention that a judgment may and ought to be held valid as to persons summoned, and who had an opportunity to make their defence, even though it may be void as to others against whom no process was issued. But if it be well settled, and such seems to be the law, that a judgment which is void as to one of the defendants is void also as to the other, the plaintiff in taking such a judgment has no one to blame but himself. In bringing suit against two parties on a joint contract, it was his duty to have direct process to be issued against both, and if he failed to do so and subsequently took a judgment against one of the defendants never had been summoned, he has no right to complain, because the law will not enforce the payment of such a judgment.”<sup>4</sup>

§ 558. In the construction of the statutes of a State, especially those affecting titles to real property, or which involve a rule of property, the authority of the Legislature, under its

<sup>1</sup> *Wright v. Andrews*, 130 Mass. 150.

<sup>2</sup> *Rangely v. Webster*, 11 N. H. 299; *Motteux v. St. Aubin*, 2 W. Blacks. 1133; *Ashlin v. Langton*, 4 Moo. & S. 719; *Gerard v. Basse*, 1 Dall. 119;

*Silver v. Reynolds*, 17 N. J. L. 266; *Bowler v. Houston*, 30 Gratt. 266.

<sup>3</sup> *Douglass v. Massie*, 16 Ohio

<sup>4</sup> *Hanley v. Donoghue*, 59 Mo. S. C., 43 Am. R. 534.

stitution to pass a particular statute, the true interpretation of any statute passed by it, the acts which will be justified under State Statutes, the construction of its constitution, &c., the supreme court of the United States say are matters exclusively within the determination of the highest court of the State. The 34th section of the Judiciary act of 1789, directed "that the laws of the several States, except where the statutes, treaties, or constitution of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States, in cases where they apply. And in cases depending on the laws of a particular State, the Supreme Court of the United States adopt the construction of those laws, which have been given by the courts of that state,<sup>1</sup> whatever may be the opinion of that court as to their original soundness, and though, independently of such decision, it would have decided differently.<sup>2</sup>

<sup>1</sup> *Elmendorf v. Taylor*, 10 Wheat. 152; *Shelby v. Guy*, 11 Wheat. 361; *Jackson v. Chew*, 13 Wheat. 153; *U. S. v. Morrison*, 4 Pet. 124; *Henderson v. Griffin*, 5 Pet. 151; *Thacher v. Powell*, 6 Wheat. 119; *McCluny v. Silliman*, 3 Pet. 277; *Polk v. Wendal*, 9 Cranch, 87; *Shipp v. Miller*, 2 Wheat. 316; *Fullerton v. Bank*, 1 Pet. 614; *Society v. Watts*, 1 Wheat. 290; *Ross v. McLung*, 6 Pet. 283; *Beach v. Viles*, 2 Pet. 678; *Hinde v. Vattier*, 5 Pet. 398; *Davis v. Mason*, 1 Pet. 503; *Steele v. Spencer*, 1 Pet. 558; *Livingston v. Moore*, 7 Pet. 469; *McKeen v. Delancey*, 5 Cranch, 22; *Gardner v. Collins*, 2 Pet. 58; *D'Wolf v. Rabaud*, 1 Pet. 501; *Bell v. Morrison*, 1 Pet. 359; *McCormick v. Sullivan*, 10 Wheat. 192; *Thompson v. Phillips*, 1 Baldw. 285; *Ross v. Borland*, 1 Pet. 664; *Waring v. Jackson*, 1 Pet. 570; *Owings v. Hull*, 9 Pet. 607; *U. S. v. Monson*, 1 Gall. 18; *Coates v. Muse*, 1 Brock. 339; *Parsons v. Bedford*, 3 Pet. 444; *R. R. Co. v. Georgia*, 98 U. S. 359; *Green v. Neal*, 6 Pet. 291; *Mooney v. Humphrey*, 4 McCrary,

112; *Orvis v. Powell*, 98 U. S. 176; *Prince's, The*, 8 Ben. 209.

<sup>2</sup> *Aicardi v. State*, 19 Wall. 635; *Elmwood v. Marey*, 92 U. S. 289; *Davis v. Indiana*, 94 U. S. 792; *Walker v. Comm'rs*, 17 Wall. 648; *Morgan v. Town Clerk*, 7 Wall. 600; *Nesmith v. Sheldon*, 4 McLean, 375; *Bank v. Iowa*, 12 How. 1; *Luther v. Borden*, 7 How. 1; *Nichols v. Levy*, 5 Wall. 433; *Leavenworth v. Barnes*, 94 U. S. 70; *Williamson v. Suydam*, 6 Wall. 723; *Miles v. Caldwell*, 2 Wall. 35; *Meade v. Beale*, Taney, 339; *King v. Wilson*, 1 Dill. 555; *Polk v. Chicago*, 94 U. S. 166; *Leffingwell v. Warren*, 2 Black. 559; *Ottawa v. Perkins*, 94 U. S. 260; *Suydam v. Williamson*, 24 How. 427; *Bailey v. McGuire*, 23 Wall. 215; *Hall v. De Cuir*, 95 U. S. 485; *Polk v. Wendell*, 9 Cranch, 98; *Olcott v. Supervisors*, 16 Wall. 689; *Princess, The*, 8 Ben. 209; *Fairfield v. Gallatin*, 100 U. S. 47; *Kountze v. Omaha*, 5 Dillon, 443; *Ins. Co. v. Massachusetts*, 6 Wall. 611; *Olive v. Omaha*, 3 Dill. 368; *Townsend v. Todd*, 91 U. S. 452; *Lane Co. v. Oregon*, 7 Wall. 71; *Su-*

Such has been the general rule of decision of the highest tribunal in the land. "Undoubtedly some exceptions to it have been recognized. One of them is, that when the highest court of a State has given different constructions to the Constitution and laws, at different times, and rights have been acquired under the former construction, we have followed that and disregarded the latter. With much more reason may we change our decision construing a State Constitution when no rights have been acquired under it and when it is made to appear that before the decision was made the highest tribunal of the State had interpreted the Constitution differently, when that interpretation within the State fixed a rule of property and has never been abandoned. In such a case we think it our duty to follow the State courts and adopt as the true construction that which those courts have declared."<sup>1</sup> If those decisions conflict the latest will be followed.<sup>2</sup> Among the final determination of State courts of last resort that are held binding upon all the Federal courts the following will serve as instances of the rule above laid down. The rules of evidence prescribed by the laws of a State,<sup>3</sup> and the construction put upon them although opposed to a specific rule by the Federal court for the circuit. The correctness of proceedings in the State courts as to points of practice.<sup>4</sup> The construction of the recording acts of the State.<sup>5</sup> The effect of State laws

pervisors v. U. S., 18 Wall. 71; Walworth v. Kneeland, 15 How. 348; Raymond v. Longworth, 4 McLean, 481; Springer v. Foster, 2 Story, 383; U. S. v. Morrison, 4 Pet. 124; Oakland v. Skinner, 94 U. S. 255; Butz v. Muscatine, 8 Wall. 575; Gut v. State, 9 Wall. 35; Dred Scott v. Sandford, 19 How. 393; Parker v. Phetiplace, 2 Cliff. 70; Blossburg v. R. R., 5 Blatch. 347; Sumner v. Hicks, 2 Black, 532; Strong. The Samuel, 1 Newb. Adm. 187; Boyle v. Arledge, 1 Hemp. 620; Hartford v. Bridge Co., 10 How. 511; Withers v. Buckley, 20 How. 84; Christy v. Pidgeon, 4 Wall. 196; Nesmith v. Sheldon, 7 How. 818; R. R. Tax Cases, 92 U. S. 575; Orvis v.

Powell, 98 U. S. 140; Concord v. Bank, 93 U. S. 625; Randall v. Bingham, 7 Wall. 523.

<sup>1</sup> Fairfield v. Gallatin, 100 U. S. 47. Smith v. Shriver, 3 Wall. Jr. 219.

<sup>2</sup> Neal v. Green, 1 McLean, 18; Bank v. Longworth, 1 McLean, 35; Blossburg v. R. R., 5 Blatchf. 387; Leffingwell v. Warren, 2 Black, 559, Sumner v. Hicks, 2 Black, 532.

<sup>3</sup> Wright v. Bales, 2 Black, 535; Ryan v. Bindley, 1 Wall. 66; Screw Co. v. Bliven, 3 Blatchf. 240; U. S. v. Douglass, 2 Blatchf. 207.

<sup>4</sup> Beer Co. v. Massachusetts, 97 U. S. 25; Bank v. Lowery, 93 U. S. 72; R. R. Co. v. Hopkins, 94 U. S. 11.

<sup>5</sup> Townsend v. Todd, 91 U. S. 452.

on corporate franchises, that they are subject to amendment or repeal.<sup>1</sup> What corporations are included in legislative acts.<sup>2</sup> The decision that the removal of an attorney, without formal legal process, is not in violation of the constitution of the State.<sup>3</sup> That a corporation chartered by its legislature has violated its charter,<sup>4</sup> or that a foreign corporation cannot avail itself of the State Statute of Limitations.<sup>5</sup>

§ 559. Although the Supreme Court of the United States follows the latest settled adjudications of the State courts giving construction to the laws and constitutions of their own States, it will not necessarily follow decisions which may prove but oscillations in the course of such judicial settlement. Nor will it follow any adjudication, to such an extent as to make a sacrifice of justice and law. Thus where a series of decisions are made by the Supreme Court of a State, construing a statute in one way, and that way is in harmony with numerous decisions of other States upon similar statutes, and meets the approbation of the Supreme Court of the United States the last named court will regard such interpretation of the statute as a true one, so far as respects investments of money made during the time that those decisions were unreversed. The fact that the Supreme Court of the State which made such former decision, now holds that those decisions were erroneous, and ought not to have been made, can have no effect upon transactions in the past, however it may affect those in the future.<sup>6</sup>

But the Federal courts are not bound, in the interpretation of deeds, by the local adjudications of a particular State,<sup>7</sup> nor in questions of commercial or general nature,<sup>8</sup> as the validity of negotiable bonds in the hands of a *bona fide* holder without notice,<sup>9</sup> or where private rights are to be determined by common

<sup>1</sup> Stone v. Wisconsin, 94 U. S. 181.

<sup>2</sup> U. S. v. Fox, 94 U. S. 315; Following White v. Howard, 46 N. Y. 315.

<sup>3</sup> Randall v. Brigham, 7 Wall. 523.

<sup>4</sup> Smith v. Kernochan, 7 How. 198.

<sup>5</sup> R. R. Co. v. Blossburg, 20 Wall. 137; Leffingwell v. Warren, 2 Black, 559; Sumner v. Hicks, 2 Black, 532; under § 34 of the Judiciary act of

1798; Blossburg v. R.R. Co., 5 Blatchf. 387.

<sup>6</sup> Gelpcke v. Dubuque, 1 Wall. 175; Supervisors v. Schenck, 5 Wall. 772.

<sup>7</sup> Thomas v. Hatch, 3 Sumner, 170; Foxcraft v. Mallett, 4 How. 353.

<sup>8</sup> R. R. Co. v. Bank, 102 U. S. 14; Robinson v. Ins. Co., 3 Sumn. 220; Williams v. Ins. Co., 3 Sumner, 270.

<sup>9</sup> Supervisors v. Schenck, 5 Wall. 772.

law rules alone,<sup>1</sup> or statutes prescribing remedies of creditors,<sup>2</sup> or where land titles depend on compacts between States;<sup>3</sup> and in cases depending upon the principles of general equity jurisprudence.<sup>4</sup> It is said, in cases depending on State statutes, if a question of construction has not been decided in the State courts, the duty of construction devolves upon the tribunal where the case is pending,<sup>5</sup> and if the State court subsequently decides the question otherwise, the Supreme Court will not feel bound to follow the subsequent decision of the State court<sup>6</sup>, or if a circuit court follows one construction and subsequently the State court makes a different one on the same statute.<sup>7</sup> And where territory acquired by the United States, is divided into several States, and a law general to the whole territory continues in force in the several States, and receives various judicial interpretation, the Supreme Court will adopt whichever interpretation has been placed upon it by the highest court of the state in which the suit may originate.<sup>8</sup>

§ 560. Where, however, by the course of the decisions of the State courts, certain rules are established which become rules of property and action in the State, and have all the effect of law—especially with regard to the law of real estate and the construction of State constitutions and statutes,—the courts of the United States always regard such rules as authoritative declarations of what the law is. But where the law has not been thus settled, it is their right and duty to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence; and when contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions of the State tribunals, or when there has been no decision, the courts of the United States assert the right to adopt their own interpretation of the law

<sup>1</sup> *Van Bokelen v. R. R.*, 5 Blatchf. 379; *Leffingwell v. Warren*, 2 Black, 559; *Olcott v. Supervisors*, 16 Wall. 678; *Sumner v. Hicks*, 2 Black, 532.

<sup>2</sup> *Butz v. Muscatine*, 8 Wall. 575; *Venice v. Murdock*, 92 U. S. 494.

<sup>3</sup> *Marlatt v. Silk*, 11 Pet. 1.

<sup>4</sup> *Russell v. Southard*, 13 How. 139; *Neves v. Scott*, 13 How. 268.

<sup>5</sup> *Loring v. Marsh*, 2 Cliff. 469.

<sup>6</sup> *Pease v. Peck*, 18 How. 595.

<sup>7</sup> *Morgan v. Curtenius*, 20 How. 1.

<sup>8</sup> *Christy v. Pridgeon*, 4 Wall. 196.

pplicable to the case, although a different interpretation may be given by the State courts after such rights have accrued.<sup>1</sup>

§ 561. The decisions of the Supreme Court of the United States on the constitutionality of the laws of the United States, or upon the construction of the powers and authority of the constitution, are definitive and binding upon all tribunals of the Union, because by the constitution their judgments are final and without appeal,<sup>2</sup> and where questions arise under Federal laws, the decisions of the Federal courts must be followed.<sup>3</sup> The question whether a statute of a State violates the Constitution of the United States, is one to be settled and determined by the Supreme Court of the United States, and however much a State court might feel disposed to differ from the view of the Federal court, the decision of the Federal court must control, and it is the duty of State courts to conform to and follow the decision of the Supreme Court of the United States on a question of that character.<sup>4</sup>

§ 562. It is held that it is for a State court, not the United States courts, to determine authoritatively what rights a statute confers, though the Federal courts have the power to determine whether a subsequent law conflicts with those rights; therefore, a decision of the United States Supreme Court as to what rights a statute confers, is not conclusive on the State courts where the same statute is called in question in another case,<sup>5</sup> and where there is a conflict between the United States Supreme Court and that of the Supreme Court of a State, the latter will adhere to its

<sup>1</sup> *Burgess v. Seligman*, 107 U. S. 20; *Horton v. Reed*, 13 R. I. 306; *R. Co. v. Georgia*, 98 U. S. 359; *Post v. Superior*, 105 U. S. 667; *Burham v. Fritz* 12 F. R. 368; *Secor v. Singleton*, 9 F. R. 809; *Lamborn v. Comm'rs*, 97 U. S. 181; *Davie v. Briggs*, 37 U. S. 628; *R. R. Companies v. Gaines*, 97 U. S. 697; *Wade v. Walnut*, 105 U. S. 1; *Fairfield v. Gallatin Co.*, 100 U. S. 47; *Moore v. Bank*, 104 U. S. 625; *Kountze v. Omaha*, 5 Dillon, 443; *Leslie v. Urbana*, 8 Biss. 435.

<sup>2</sup> *Hicks v. Hotchkiss*, 7 Johns. Ch.

279; *Ins. Co. v. Fisk*, 1 Paige, 90; *Bushnell*, in re, 9 Ohio St. 77; *Black v. Lusk*, 69 Ill. 70; *Cochran v. Darcy*, 5 S. C. 125; *Bouchard v. Parker*, 32 La. Ann. 535.

<sup>3</sup> *Duncombe v. R. R.*, 84 N. Y. 192; *Bunnell v. Burges*, 33 Gratt. 472.

<sup>4</sup> *Salzenstein v. Mavis*, 91 Ill. 399.

<sup>5</sup> *McIntyre v. Ingraham*, 35 Miss. 25; *Franklin v. Kelly*, 2 Neb. 79; *Levy v. Mentz*, 23 La. An. 261; *Lownsdale v. Portland*, 1 Oreg. 381; *Skelly v. Bank*, 9 Ohio St. 506; *Reny v. Wheeler*, 12 Bush, 541.

own decisions in cases in which its own jurisdiction is ample and its judgments final.<sup>1</sup>

§ 563. The Supreme Court of the United States in the cases of *Pennoyer v. Neff*<sup>2</sup> and *Galpin v. Page*,<sup>3</sup> have established the doctrine that by virtue of the 14th amendment a writ of error will issue from the Supreme Court of the United States to the highest court of a State subjecting to re-examination any judgment which declares the validity of a judgment of an inferior court of a State, objected to directly or collaterally on the ground that it is in violation of the Fourteenth amendment. This being a principle well settled by that court, any party defendant has the right to have a judgment rendered by any State court, no matter how limited its jurisdiction, reviewed by the highest court of the Nation upon this ground. This being the settled rule, the question arises, shall the highest court of a State follow this rule? There can be no question but what the same right existed in regard to the re-examination of judgments by the Supreme Court of the United States prior to the adoption of this amendment. It is a doctrine as old as *Magna Charta* that no person shall be deprived of his property without due process of law, and the basis of the doctrine established by the Supreme Court of the United States is that principle.

The Supreme Court of California states its reasons for accepting the decisions of the United States Supreme Court as conclusive upon it on the following grounds: "Where the doctrine held by this court conflicts with that held by the United States Supreme Court, this court will, in a case that is reviewable by the United States Supreme Court, follow the doctrine of that court in preference to its own. The Supreme Court of California in<sup>4</sup> decided that the validity of a judgment of a District Court of the State is to be conclusively presumed from the existence of the judgment itself, unless it affirmatively appears from the record that the court *has not* jurisdiction; and although the only assertion in respect to the jurisdictional fact of personal service found in the record shows no such service to have been had, and the non-residence of the defendant—that the *judgment* conclusively

<sup>1</sup> *Shelton v. Hamilton*, 23 Miss. 496.

<sup>2</sup> 18 Wall. 350.

<sup>3</sup> 95 U. S. 714.

<sup>4</sup> *Hahn v. Kelly*, 34 Cal. 391.

proves the defendant to have been served within the State. The United States Supreme Court in' held, that although a State having property of a non-resident within her territory, may hold and appropriate it to satisfy the claim of her citizen against him, and her tribunals may inquire into his obligation to the extent necessary to control the disposition of that property, yet in the absence of such seizure, a personal judgment is without validity, if it be rendered by a State court in an action upon a money demand against a non-resident, who was sued by publication of summons, but upon whom no personal service of process within the State was made, and who did not appear. *Galpin v. Page*.<sup>1</sup> It may now be urged that in respect to the effect to be given to a judgment of a court of general jurisdiction and the presumptions arising from it, the Supreme Court of the United States will follow the ruling of the highest court of the State. But it was said, "It must be kept in mind, that it is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the Constitution or statutes of a State, which the Federal courts adopt as rules for their own judgments."<sup>2</sup> And in the language of Mr. Justice Field in the Circuit Court,<sup>3</sup> "The ruling of the State court in *Hahn v. Kelly*, except so far as it gives a construction to the State statute, relates to matters of general law, and not to questions of a local character peculiar only to the State. If the ruling of the court be correct, it applies not merely to judgments of the Superior Courts of general jurisdiction existing in California, but to the judgments of such courts existing in all other States." In *Pennoyer v. Neff* it was held, that since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of personal judgments against individuals not within the jurisdiction of a State court may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice, to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law." "It has always been the practice here to adopt that view of a legal question which has been taken by the

<sup>1</sup> *Pennoyer v. Neff*, 95 U S 714. 687.

<sup>2</sup> *Galpin v. Page*, 18 Wall. 350.

<sup>3</sup> *Alcott v. Supervisors*, 16 Wall.

<sup>4</sup> *Galpin v. Page*, 3 Sawyer, 107;  
*Chicago City v. Robbins*, 2 Black, 429.

Supreme Court of the United States, when the question involved is within the branch of the jurisdiction of that court which may be exercised by writ of error to this court. To recapitulate, 1st, a writ of error will issue from the Supreme Court of the United States to this court, subjecting to *re-examination any judgment* which declares the validity of a judgment of a district court of the State, objected to directly or collaterally on the ground that it is in violation of the Fourteenth Amendment of the Constitution of the United States; 2d, in such proceeding the Supreme Court of the United States will not follow the rule laid down by the Supreme Court of this State, as laid down by our predecessors in *Hahn v. Kelly*, in respect to the conclusive presumption to be drawn from a judgment of a district court of this State, but will declare the law as announced in *Galpin v. Page*, and *Pennoyer v. Neff, supra*. 3d. To accord with the decisions of the Supreme Court of the United States, the judgment in the district court in the present action must be held null and void. 4th. When our judgment must depend upon a question which may be re-examined by the Supreme Court of the United States on a writ of error, we will follow the rule of law laid down by that court.”

§ 564. It is somewhat strange to find adjudications upon the effect of a judgment rendered in the Circuit Court of the United States in a State comprising one or more districts, that there should be a suit brought in a State court upon such a judgment is an anomaly, when we consider that every mode of relief guaranteed by a State court can be had in the Circuit Court of the United States in that district. Final process is executed in the same manner as it is under the State law, and with the exception of one being a State and the other a national tribunal, there may be said to be no difference between the two courts; if there is any advantage it is in favor of the Federal court, as it generally includes the whole State, while a superior court is limited to a certain county or subdivision of the State. Yet there are cases where suits have been brought in the State court upon such judgment, but upon what ground we are content to let others surmise. It is not difficult to see how such judgments may be questioned when they are offered or set up by a defendant who

<sup>1</sup> *Belcher v. Chambers*, 53 Cal. 635.

is sued upon a cause of action in a State court which has been merged in a judgment rendered in the Circuit Court of such district, or when a judgment from a State court is set up in the Federal Court sitting within the same State. That they are independent tribunals is unquestioned. State legislatures cannot affect or control their jurisdiction, nor State courts interfere with their process, yet they are constantly proceeding in accordance with the State laws in regard to practice, evidence, &c. The laws of each State furnish the rules of decision of such courts. The citizens of the State are summoned and serve as jurors, and are amenable to its process, their property is liable to seizure and sale by its officers under final process in the same manner as in State courts. The Circuit Court of the United States, though limited in the extent of its jurisdiction, in respect to the cause of action and subjects of which it may take cognizance within such limits, it possesses the same general authority that belonged to superior courts of record at common law, and its judgments and proceedings are entitled to receive the like favorable presumptions and intendments for their support. In no just sense can it be regarded as a foreign tribunal, or as holding the same relation to the government of this State, as is held by the courts of a sister State. It derives its authority from a common national government, whose Constitution is alike obligatory upon it and our own courts, as the supreme law in respect to all matters coming within the scope of its provisions. In the determination of all questions properly brought before it for adjudication, it must take cognizance and have reference to the same laws, State and Federal, that are binding upon the State courts in the disposition of like questions presented for their decision.

Its judgments rendered in the district are operative throughout the State, and may be enforced by execution anywhere within its boundaries. Every suitor therein feeling aggrieved by any of its decisions or judgments, may, without subjecting himself to a foreign jurisdiction, obtain relief therefrom, if erroneous, as freely as in the State courts, by a direct application to the court itself or by a review on error or appeal.

No good reason occurs why its judgments ought not to be placed on the same footing with the domestic judgments of

superior courts of record of the State and treated accordingly, and such is undoubtedly the true rule.<sup>1</sup>

In respect to this class of judgments, whenever their validity is sought to be impeached in any collateral proceeding, jurisdiction will be conclusively presumed unless the contrary affirmatively appears upon the face of the record itself.<sup>2</sup>

Being regarded as domestic judgments, natural comity requires that the judgment of a State court in the same district should be treated in the same manner, and this may be said to be the rule. That the judgment of a State court will be regarded by the Federal courts sitting within the territorial limits of the State in which it was rendered as a domestic judgment,<sup>3</sup> the judgment of a State court should be regarded as domestic by the Federal courts in the same State; both Federal and State courts enforce and give effect to the same laws, summon jurors from, and their judgments operate upon and compel seizure and sale of the property of, the same citizens, and they are not, therefore, foreign to each other.

Being a domestic judgment, it may be shown to be void upon its face if the court rendering it had no jurisdiction of the defendant's person; and it is equally true that, except for errors affecting the jurisdiction of the court, its validity cannot be questioned. If jurisdiction of the person was obtained in the State court the Circuit Court must regard it as conclusive of the question determined, and give it full force and effect. It was held that the judgment of a District Court of the United States, having jurisdiction of the parties and the subject matter of the judgment, is conclusive between the parties in a State court, upon the merits of the matter adjudged, but the jurisdiction of the court is always open to inquiry.

Where there is nothing in the action of the court to show that the defendant was notified, and the judgment upon its face

<sup>1</sup> *Thompson v. Lee Co.*, 22 Iowa, 206; *Hughes v. Davis*, 8 Md. 271; *St. Albans v. Bush*, 4 Vt. 58; *Earl v. Raymond*, 4 McLean, 233; *Turrell v. Warren*, 24 Minn. ; *Barney v. Patterson*, 6 H. & G. 184; *Taylor v. Phelps*, 1 H. & G. 492; *Womack v. Dearman*, 7 Port. 518; *Niblett v.*

*Scott*, 4 La. Ann. 246; *Steinbach v. Ins Co.*, 77 N. Y. 498.

<sup>2</sup> *Hahn v. Kelley*, 34 Cal. 391; *Coit v. Haven*, 30 Conn. 190; *Kipp v. Fullerton*, 4 Minn. 473; *State v. McDonald*.

<sup>3</sup> *Owens v. Gotzian*, 4 Dill. 436.

shows that the defendant did not appear, and the return of the marshal is without any formal venue, and does not state where the defendant was served, it is competent for the defendant in a suit on the judgment in a State court, to show that the service was effected out of the territorial jurisdiction of the marshal, and when he had no authority to effect service.<sup>1</sup>

The Supreme Court of the United States have determined that while the courts of the United States are not foreign tribunals in their relation to State courts, they are tribunals of a different sovereignty, and are bound to give to a judgment of a State court only the same faith and credit which it is entitled to in another State,<sup>2</sup> and a judgment of a State court having jurisdiction of the parties and the subject matter of the suit is conclusive upon the parties and their privies in the Federal court in the same State, as *res adjudicata*, as a complete bar to the suit.<sup>3</sup> The decree of a district court of admiralty, on a libel in admiralty, that the libelants recover a certain amount, is a judgment upon which a suit may be brought in a State court.<sup>4</sup> A decree *in rem* of the United States District Court of one district is not competent evidence in the District Court of another district in a suit *in personam* in the nature of a proceeding for a penalty for an offense.<sup>5</sup>

§ 565. There has been considerable discussion in various State tribunals as to the status of the Federal courts established by Congress in the various States and of the effect of their final judgments when called in question or presented in evidence in the courts of the State in which such Federal court is established, whether such judgments are to be classed as foreign judgments or regarded with the same attributes which judgments of other States are. Cases may be found supporting either view, but we think that neither are precisely correct. Each State is a component part of the United States in a manner similar to that in which local municipal subdivisions or corporations are component parts of the State. The Constitution of the United States is the organic law not only of the Federated States but of each particu-

<sup>1</sup> McCauley v. Hargroves, 48 Ga. 50. 482.

<sup>2</sup> Pennoyer v. Neff, 95 U. S. 714.

<sup>4</sup> Brown v. Bridge, 106 Mass. 562.

<sup>3</sup> Montgomery v. Sarmory, 99 U. S.

<sup>5</sup> Allen v. U. S., Taney, 112.

lar State. Every part of it has been submitted to and received the sanction and been ratified by each State, and each State has bound itself to accept it as the fountain head from which all its rights and privileges are obtained. Every act done, every law passed, every step taken by a State in conflict with the Constitution of the United States is absolutely void; so every act done, every step taken, every ordinance passed or order made by the local political subdivisions of the State in conflict with the constitution of the State and of the United States is likewise void. Where there is any conflict between the two the Constitution of the United States controls. Every official, no matter what his position may be in a State, when he takes his oath of office swears to support the Constitution of the United States as well as the Constitution and laws of his own State. The Constitution of the United States and the acts of Congress are as much a portion of the constitution and laws of every State as if specially enacted by each State. Every State has its representation in the law-making power of the nation the same as the local subdivisions of the State have in its law-making power. No State can exclude from its territorial limits the enforcement or fulfillment of national legislation; it is bound to give full effect to all of its laws, which may, when necessary, be summarily enforced. No State can prevent Congress from establishing and maintaining Federal tribunals within its territory. In the scheme for the establishment of the Federal Union, the system of Federal tribunals independent of State governments was provided for and agreed upon, with exclusive control over such tribunals to be vested in the National Congress; to which all of the States assented. The government of the United States does not ask permission of any State to establish its courts therein; it has the paramount authority so to do. Its courts are not foreign courts, they are not constituted, set up or created by foreign government. The United States government is not foreign to any State in the Union. It is not a sovereign or government outside of any State, but within it, spreading all over it, a superior government embracing it. The citizens of the United States constitute the citizens of every State, and the citizens of every State are citizens of the United States. Its laws control its citizen in every State; and it governs and controls every State by its

organic act and its laws. Its courts, established in each State, have with the courts of each State jurisdiction alike over the citizens of the State, dispensing justice alike for each. By the act of Congress known as the "Judiciary Act of 1789," by the 34th section thereof, it was directed "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." And subsequent legislation has directed that the practice in the Federal Courts shall conform to and be as near as possible to that of the State courts of the States in which they are located. So that the proceedings, in all actions at law, except where otherwise provided, are precisely the same as the practice established by each State for its own tribunals. The same grievances are redressed, the same remedies afforded, and the same laws enforced under the construction given them by the highest tribunal of the State. No sister State has any like authority within the territorial limits of another; while its laws, its mode of administering justice, and its regulations may be precisely the same, they have no effect within the territorial limits of any other State, except such as are given by the paramount authority of Congress or by comity. The Federal Courts within each State are as much domestic courts as if created by the laws of such State, as they emanate from a power within such States. The jurisdiction of both Federal and State Courts, created by the laws of both governments, are concurrent—they run together. The same laws are enforced by each, the same steps are taken by each from the commencement to the termination of an action; their judgments are enforced in the same manner, and the same relief is afforded in like cases; the property real or personal of a citizen of a State is levied on and sold on the final process from one court the same as it is from the other. No authority is desired, none is asked by the officers of the Federal court from a State in executing Federal process within its territorial limits; no State authority can interfere with its mandates, nor can the Federal tribunals, except where the power is conferred upon them by Congress, interfere with the State courts. A Federal court is, therefore, neither a foreign court nor is it a court of another sovereignty, like a court

## FOREIGN JUDGMENTS.

of another State ; for, by the very power which creates it, its territorial jurisdiction is made co-extensive with the limits of the State in which or for which it is created, or, in cases where there are one or more Federal tribunals within the limits of a State, each tribunal has its jurisdiction confined to some portion of the State within but not beyond the territorial limits of such State. It must, therefore, be apparent that the judgments of such courts within the States where rendered must have accorded to them the same effect as domestic judgments, and, therefore, like domestic judgments, only subject to attack upon the ground of jurisdiction over the person and the subject matter.

Where the same matters involved in a suit in equity were involved in a prior suit, though in the United States Circuit Court, and the suits were between the same parties, the decision in the prior suit will be conclusive on the trial of the second suit brought in the State court. Where a suit is brought in the United States Circuit Court to enjoin the collection of a certain tax for certain years, which relief is denied on a final hearing of the merits, and the bill dismissed, this will be a bar to a bill brought by the same complainant against the collectors of the same taxes, seeking the same identical relief, although other reasons and grounds may be alleged in the second suit for granting the same. A prior adjudication between the same parties is conclusive upon them, not only as to the matters actually determined, but as to every other thing within the knowledge of the parties which might have been set up as a ground for relief or defense.<sup>1</sup>

§ 566. The judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced.<sup>2</sup>

“The rule for determining what effect shall be given to such judgments is that declared by this court, in respect to the faith and credit to be given to the judgments of State courts

<sup>1</sup> Ruegger v. R. R. Co., 103 Ill. 449.

<sup>2</sup> Barney v. Patterson, 6 Har. & J. 182; Niblett v. Scott, 4 La. Ann. 246; Adams v. Way 33 Conn. 419; Womack v. Dearman, 7 Port. 513; Pepoon v.

Jenkins, 2 Johns. Cas. 119; Wilkes v. Wilkes, 14 Pa. St. 228; Turnabeyson, 95 U. S. 418; Cage's Exr. v. Cassidy, 23 How. 109; Galpin v. Page, 3 Sawy. 93.

the courts of other States. 'They are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be; and, consequently, are conclusive upon the defendant in every State, except for such causes as would be sufficient to set aside the judgment in the courts of the State in which it was rendered.'"<sup>1</sup> And the Supreme Court of the District of Columbia, or of a Territory, being a court of the United States, its judgment, when suit is brought thereon in any State of the Union, is, under the legislation of Congress, conclusive upon the defendant, except for such cause as would be sufficient to set it aside in the courts of the district.<sup>2</sup>

§ 567. Judgments of foreign courts in States or Nations at war with one another, rendered after the commencement of such war, upon lawful jurisdiction acquired over the parties, previous to the breaking out of such war are governed in a measure by the principles of international law. The question was frequently considered during the late war in this country which considerations resulted in conflicting, if not some novel decisions. The Supreme Court of the United States<sup>3</sup> in regard to the status of the States which had attempted to secede from the Union and in rebellion, attempted to establish an independent government, said: "The States which seceded in rebellion did not thereby lose their existence or independent autonomy. They continued to be States and States of the Union, and the functions of all departments of the State—legislative, executive, or judicial—were unimpaired. Their acts and proceedings were valid, except such as were in aid or furtherance of the rebellion. The Confederacy and its measures are held void because it was organized by and for treason only. But the States stood upon a different footing. There was no validity in any legislation of the Confederate States which this court can recognize. The legislation of the States stands on very different grounds. The same general form of government, the same general laws for the administration of justice and the protection of private rights, which had existed in the States prior to the rebellion, remained during its continuance and afterwards. As far as the acts of the States

<sup>1</sup> *McElmoyle v. Cohen*, 13 Peters, 812; *Embry v. Palmer*, 107 U. S. 3.

<sup>2</sup> *Embry v. Palmer*, 107 U. S. 3.

<sup>3</sup> *Horn v. Lockhart*, 17 Wall. 580.

did not impair or tend to impair the supremacy of the national authority or the just rights of citizens under the Constitution, they are in general to be treated as valid and binding. The existence of a state of insurrection and war does not loosen the bonds of society, or do away with civil government or the regular administration of the laws. Order is to be preserved, police regulations maintained, crimes prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the constitution.”<sup>1</sup>

§ 568. The provision of the Federal Constitution, requiring full faith and credit to be given to the public acts, records and judicial proceedings of every other State, is therefore applicable to every judicial proceeding between parties, other than such as are termed confiscation proceedings and such as were in aid of the rebellion.<sup>2</sup>

§ 569. Yet in a case, where a suit was commenced in Arkansas in 1857 by attachment, the plaintiff being a resident of the former State and the defendant a resident of Ohio, the defendant appeared in the case, employed counsel, filed an answer, prior to the breaking out of the war, and shortly after the war was declared, the case was duly tried, depositions and other evidence being used at the trial, the defendant's attorney having taken all the necessary steps to defend the action to the best of his ability, and after rendition of judgment against the defendant filed a motion for a new trial, which was heard and overruled, and took a bill of exceptions containing all the evidence, but took no further

<sup>1</sup> Williams v. Bruffy, 96 U. S. 176; Ketchum v. Buckley, 99 U. S. 183; Texas v. White, 7 Wall. 700; Horn v. Lockhart, 17 Wall. 580; Spiott v. U. S., 20 Wall. 459, White v. Cannon, 6 Wall. 443; U. S. v. Ins Cos, 23 Wall. 99; Taylor v. Thomas, 22 Wall. 479.

<sup>2</sup> Hawkins v. Filkins, 21 Ark 286; Hendry v. Cline, 29 Ark 414; Beiler v. Page, 24 Ark 363; Baldwin v. Goodwin, 24 Ark. 436; Hughes v. Stinson, 21 La. Ann. 540, White v. Cannon, 6 Wall. 443; Harlan v. State, 41 Miss. 566, Brown v. Wright, 39 Ga. 96.

steps; it was held, on an action brought in Ohio against the defendant on this judgment, that it was void. In the proceedings in Ohio on this judgment the defendant alleged the employment of the attorney, but did not even suggest that his authority was revoked; that he acted without authority, or in bad faith: or that he desired to or that there was any occasion for his attendance at the trial. But the gravamen of his defense was that the people, including the judge of the court, the plaintiff, and his own attorney, were rebels and enemies of the United States, and were not acting under its government or authority, but under a usurped and illegal government termed the Confederate States. And also alleged that he was illegally deprived of his rights as a citizen of the United States by the plaintiff, judges and officers of the court, and therefore the judgment was fraudulent and void. In declaring this judgment void, the Supreme Court of Ohio, in adopting the decision of the Supreme Court Commission of that State, say: "First, as between parties residing in the State of Arkansas and within the rebel lines, and a citizen of Ohio resident within the Union lines, between whom the war made intercourse impossible, there could be no jurisdiction in such court by which the rights of non-residents could be injuriously affected." This may be considered as based upon sound principles in many instances, but there are exceptions to the rule. Second. The court further said: "Neither could such jurisdiction be acquired by the consent or waiver of an attorney practicing in said court, *who was employed and appeared for the non-resident defendant before the war commenced. His general authority as an attorney, before the war, though not revoked by the clients*, did not authorize him to waive any of their rights, nor would such consent or waiver confer on the court jurisdiction over the case, or over the person of defendants." From the well established principles, that jurisdiction, once lawfully acquired, is never lost; and the well settled principle that the acts of a duly authorized attorney or agent bind the principal; and the fact that where an attorney is employed to take charge of a case he may waive, in civil causes, trial by jury as well as many other incidental matters, and that such waiver is binding on the client; and the doctrines enunciated by the Supreme Court of the United States in the cases referred to in the preceding section,



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it must be apparent that the second ground above stated is a wide departure from sound principle and well established rules of jurisprudence. The dissenting opinion of Judge Ashburn (in our judgment) is based upon unquestioned authority. He says: "When this judgment was rendered Arkansas was a State *de jure*, if not, then it was a State government *de facto*, and in either case the judicial proceedings of her courts are valid and entitled under the Constitution to full faith and credit, citing the cases in note 1."

§ 570. "The suit in Arkansas was begun, and the defendants, by their attorney, had appeared and pleaded prior to the war. The jurisdiction of the court continued unbroken. The war did not abate the suit. Giving the record good faith and credit, it disclosed the fact that the defendants, by their attorney, submitted the cause and went to trial without objection. The attorney was appointed before the war. No revocation of his authority was shown. The war did not work a revocation." A citizen of one of the adhering States having property or rights in a non-adhering State can lawfully appoint an agent or attorney in the locality of his property or rights, whose acts, within the scope of his authority, will bind his principal. And this authority continues valid, although the principal resides in an enemy's country." "To make a record of a judgment valid upon its face, it is only necessary for it to appear that the court had jurisdiction of the subject matter, of the action and of the parties, and that a judgment in fact has been rendered." The opinion is well worth careful perusal, its length prevents its reprint here. The court, with him in declaring that the judgment is valid.

- Buchanan v. Curry, 19 Johns. 137;  
 on v. Life Ass., 43 N. Y. 54;  
 v. Urquhart, 19 La. Ann.  
 v. Hanson, 4 Cal. 259; Conn.  
 Pet. C. C. 496; Ward v.  
 l. 447.  
 Co., 22 Wall. 99.  
 Foote, 27 Ohio St.  
 R. 340.

§ 571. The estoppel is not limited to the parties, but extends, as in other cases where judicial determinations are in question, to all who claim under them as privies by descent or purchase, or by construction or operation of law. Thus, a purchaser of real or personal property in one State will be bound by a judicial determination previously rendered in another against the title of the person from whom he purchases.<sup>1</sup> The law, as settled in regard to judgments of other States is, that the judgments of other States are only *prima facie* evidence of jurisdiction, though conclusive upon the merits of the matter in litigation, when the fact of jurisdiction is conceded, or established as domestic judgments,<sup>2</sup> and if successfully impeached in regard to jurisdiction, necessarily fails as to the merits, and they are not conclusive unless the court had jurisdiction of the cause and the parties. and a State cannot give to the proceedings of its tribunals a greater or more extensive operation than that of the laws from which they derive their whole force and virtue, which must necessarily be confined to those persons who reside within the State itself, or are in some other way justly amenable to its jurisdiction.

§ 572. From the authorities and cases cited in regard to the effect of judgments of other States, the following may be deduced as the law governing them:—

1st. That the plea of *nul tiel* record is the only defense admissible in an action upon them in another State.

2d. That they are *prima facie* evidence of jurisdiction, and when that is shown they are conclusive.

3d. That their operation cannot be extended beyond the limits of the jurisdiction in which they are rendered.

4th. That they operate not only in the State in which they are rendered, but in every State which has the right to resort to the original jurisdiction.

<sup>1</sup> *Marsh v. Pier*, 4 Rawl. 101; *Fletcher v. Farrell*, 9 Dalt. 101; *Rathbone v. Fry*, 1 R. L. 101; *v. Ketchum*, 11 How. 165; *Hardeman*, 14 How. 334.

<sup>2</sup> *R. R. Co. v. W.* 385; *Rocco v. Ha* 579; *Robert v. Hod*





